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Supreme Court of The United States

October Term, 1979

No. 79-454

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

JURISDICTIONAL STATEMENT

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No. _____

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant, GERALD A. LEWIS, files this statement on the basis upon which

it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the United States District Court, Northern District of Florida, Tallahassee Division in this case and should exercise such jurisdiction herein because substantial questions are presented.

Appellant appeals from the Order, entered in this action on December 15, 1978, and as altered and amended on March 22, 1979, declaring Florida Statutes § 660.10(1977) and a portion of the first sentence of Florida Statutes § 659.141(1)(1977), unconstitutional as violative of Article I § 8 of the United States Constitution, and enjoining Appellant from enforcing against Appellees the aforesaid portion of the first sentence of Florida Statutes § 659.141 (1)(1977).

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Northern District of Florida, which appears in the appendix hereto, App. B-1 and A-1, *infra*, is reported at 461 F.Supp. 1187 (N.D.Fla.1978). The Order of March 22, 1979, altering and amending the Court's Order of December 15, 1978 is not reported. It is reprinted in the appendix hereto, App. D-1, *infra*.

JURISDICTION

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a specially constituted three-judge panel convened under 28 U.S.C. § 2281. This action was filed on October 24, 1973, and thus the propriety of impanelling a three-judge court was unaffected by the repeal

of 28 U.S.C. § 2281 in 1976. Pub.L. 94-381, August 12, 1976, 90 Stat. 1119. The Order enjoins the enforcement of a portion of a certain State banking statute, and declares such portion of the statute, along with an additional State statute, unconstitutional as violative of Article I, § 8 of the United States Constitution.

The Final Order was made and entered on December 15, 1978. See App. A-1 and B-1, *infra*. A motion for clarification, reconsideration and to alter and amend judgment was duly filed December 26, 1978. The Order was altered and amended, in part, on March 22, 1979. See App. D-1 and E-1, *infra*. Notice of Appeal on behalf of the Appellant was filed on May 11, 1979 in the United States District Court for the Northern District of Florida. See App. F-1, *infra*.

The Supreme Court of the United States has jurisdiction to review the Final Order by direct appeal pursuant to 28 U.S.C. § 1253. *White v. Regester*, 412 U.S. 755, 761, 93 S.Ct. 2332, 2337, 37 L.Ed.2d 314 (1973); *Roe v. Wade*, 410 U.S. 113, 123, 93 S.Ct. 705, 711, 35 L.Ed.2d 147 (1973); *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73, 80, 80 S.Ct. 568, 573, 4 L.Ed.2d 568 (1960).

QUESTIONS PRESENTED

1. Whether the express grant of authority to the several states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a *bank* in a particular state, 12 U.S.C. § 1842(d), together with 12 U.S.C. § 1846, Reservation of Rights to the States, of the Banking Holding Company Act of 1956, as amended in 1970, also includes an implied grant of authority for a

state to prohibit or exclude a bank holding company's entry into certain activities which are deemed "so closely related to banking to be a proper incident thereto."

2. Whether a state, by statute, may require all entities, foreign or domestic, *seeking to do trust business in that state,* to incorporate in that state and obtain a specific charter and certificate of authority to do trust business without violating Article I § 8 Cl. 3 of the United States Constitution.

3. Whether the lower court incorrectly applied the Commerce Clause principles laid down by this Court in *Philadelphia v. New Jersey,* _____U.S._____, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), in holding a portion of Florida Statutes § 649.141(1)(1977), and Florida Statutes § 660.10(1977) unconstutitional.

THE CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. *Article I § 8 Cl. 3 United States Constitution*
   Congress shall have power . . . to "regulate commerce . . . among the several states, . . ."

2. Florida Statutes § 659.141(1)(1977)
   (The full text of the statute is set forth in appendix C—1 hereto.)

3. Florida Statutes § 660.10(1977)
   (The full text of the statute is set forth in appendix C—1 hereto.)

4. 12 U.S.C. § 1842(d)

   (The full text of the statute is set forth in appendix C—4 hereto.)

5. 12 U.S.C. § 1843(c)(8)
   (The full text of the statute is set forth in appendix C—5 hereto.)

6. 12 U.S.C. § 1846
   (The full text of the statute is set forth in appendix C—7 hereto.)

7. 12 C.F.R. § 225.4(a)(4) and (5)
   (The full text of the regulations is set forth in appendix C—7 hereto.)

STATEMENT OF THE CASE

Appellee, Bankers Trust New York Corporation (BTNY) is a bank holding company as contemplated by 12 U.S.C. § 1841, et seq., organized under the laws of the State of New York. BTNY created a wholly owned subsidiary, a Delaware corporation, Appellee, BT Investment Managers, Inc. (BTIM). BTIM was formed for the purpose of engaging in the business of providing investment advisory services, but because it is owned by a bank holding company, it could not engage in such business until such time as it acquired the approval of the Federal Reserve Board pursuant to 12 U.S.C. § 1842. "Acting as investment or financial adviser" is an activity the Board has determined to be a "closely related activity to banking to be deemed a proper incident thereto." 12 C.F.R. § 225.4(a)(5), App. C—5. BTNY and BTIM applied for such approval in October 1972. Objections to the application were filed by Fred O. Dickinson, Jr., as Florida Comptroller,

Appellant's predecessor in office, and by the Florida Bankers Association.

At the time the application was filed, Florida Statutes § 659.141(1)(1971) prohibited Appellee, BTNY, an out-of-state holding company, from owning or controlling an investment advisory business in Florida where or from which it furnishes investment advisory services to trust companies or banks in Florida. The Florida legislature, amended § 659.141(1), effective December 21, 1972, and extended the prohibition to businesses furnishing of investment advisory services to any person rather than, theretofore, only to Florida trust companies and banks.

In April 1973, the Board of Governors of the Federal Reserve System denied the Appellee's application, in accordance with *Whitney National Bank v. Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 55 (1965), principally because of the prohibition of Florida Statutes § 659.141(1), as amended. No appeal of the Board's Order of Denial was taken.

In addition to the investment adviser office, Appellee, BTNY is also seeking to establish, through a subsidiary, a de novo Florida trust company. Florida Statutes §§ 659.141 (1) and 660.10 together prohibit such establishment. "Trust business" is an activity the Board has determined to be a "closely related activity to banking to be deemed a proper incident thereto." 12 C.F.R. § 225.4(a)(4), App. C—5.

In October 1973, Appellees filed suit against the Comptroller of the State of Florida, Appellant's predecessor in office, seeking a declaration that Florida Statutes

§§ 659.141(1) and 660.10 contravene the United States Constitution and for an injuction restraining their enforcement.

The cause was originally dismissed by the three-judge panel on "abstention" grounds. The dismissal was appealed and eventually reversed and remanded to the district court. Upon stipulated facts, final hearing was held on September 1, 1978. The district court by Final Order, as amended, declared Florida Statutes § 660.10, and the first sentence of Florida Statutes § 659.141(1), *excluding* that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring, owning or controlling a *bank* having a place of business, unconstitutional as violative of Article I § 8 of the United States Constitution. Appellant was permanently enjoined from enforcing against Appellees the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)(1977). The district court did not grant injunctive relief as to Florida Statutes § 660.10(1977), stating,

> Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring enforcement of Florida Statutes § 660.10 would be premature, and therefore inappropriate, at this time. (See App. B—22)

A protective Notice of Appeal to the United States Court of Appeal for the Fifth Circuit was filed in the district court on April 20, 1979. On May 14, 1979, further proceedings in appeal to the Fifth Circuit were stayed, pending the resolution of any jurisdictional problem in this Court. As to Florida Statutes § 660.10 (1977), the

district court entered a declaratory judgment unaccompanied by any injunctive relief. Under these circumstances *alone*, Appellants could not appeal directly to this Court. *Gunn v. University Committee*, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684(1970). However, because the district court also entered a declaratory judgment *and* specifically granted injunctive relief as to Florida Statutes § 659.141(1)(1977), this Court has direct appeal jurisdiction pursuant to 28 U.S.C. § 1253. Consequently, this Court has jurisdiction of the *entire* appeal as to Florida Statutes §§ 659.141(1) *and* 660.10(1977), of both the injunctive and declaratory aspects of the case. *White v. Regester, supra*, at 761; *Roe v. Wade, supra*, at 123; *Florida Lime and Avocado Growers v. Jacobsen, supra*, at 80. The issues and arguments as to both aspects are substantially identical, and it is in the interest of judicial economy and the avoidance of piecemeal litigation for this Court to have appeal jurisdiction of the *entire* appeal.

FEDERAL QUESTIONS ARE SUBSTANTIAL

1. Florida Statutes § 659.141 (1)(1977)

The case presents a variation on a recurring theme in modern banking law: the tension between federal regulatory statutes designed in part to limit bank activities, and attempts by banks, and bank holding companies—often sanctioned by federal banking authorties—to compete in broader lines of business. See *Investment Company Institute v. Board of Governors of the Federal Reserve Board*. ____F.2d.____ Case No. 77-1862 (D.C.Cir. March 30, 1979). The added variation concerns the constitutional validity of a Florida banking statute which prohibits or excludes certain banking holding companies' entry into these

"broader lines" of businesses, which the Federal Reserve Board has deemed "so closely related to banking as to be a proper incident thereto." Of necessity, the district court below based its decision upon its interpretation of the congressional intent and purpose behind the enactment of the Bank Holding Company Act of 1956, and the 1970 Amendments thereto.

In holding a portion of § 659.141(1), unconstitutional, the district court ruled for the first time upon the scope of 12 U.S.C. § 1842(d), and 12 U.S.C. § 1846 in light of the 1970 Amendments to 12 U.S.C. § 1843(c)(8), which permit bank holding companies to engage, for the first time, in certain activities "closely related to banking." The precise issue of whether the express grant of authority by Congress to the several states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a *bank* includes an implied authority for a state to prohibit or exclude entry to certain activities deemed "so closely related to banking to be a proper incident there," has never before been litigated in any known decision.

In the court below, appellant argues that 12 U.S.C. §§ 1842(d) and 1846 necessarily include such authority in light of the congressional purpose of the Bank Holding Company Act of 1956, and the 1970 Amendments thereto.

The original congressional purpose behind enactment of the 1956 Act was to limit the concentration of economic power in the hands of bank holding companies. See *Alabama Association of Insurance Agents*, 533 F.2d 224, 231 (5th Cir. 1976). Section 4(a) of the Act exempted, however, companies whose activities are "of a financial, fiduciary, or insurance nature," and which the Board of Governors of the Federal Reserve has determined to be so

"closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto." Section 4(c)(8) of the Bank Holding Act. 12 U.S.C. § 1843(c)(8).

In 1970, Congress amended the Act, to include one-bank holding companies into the Act's regulatory scheme. Section 4(c)(8) was amended to delete the statutory language regarding "of a financial, fiduciary, or insurance nature." The court below interpreted the 1970 Amendment to Section 4(c)(8) as indicating congressional intent to "expand the range of business activities in which bank holding companies could engage, giving them greater flexibility." *BT, supra,* at 1200, citing *National Courier Association v. Board of Governors,* 170 U.S.App.D.C. 301, 308-09. 516 F.2d 1229, 1236-37(1975).

Appellant argues that the 1970 Amendments did not change the original congressional purpose behind enactment of the 1956 Act, which was to limit the concentration of economic power in the hands of bank holding companies. The ability of the states to exclude or prohibit acquisition of banks within a particular state must necessarily carry with it the ability to prohibit the acqusition of companies involved in closely related activities. Otherwise, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. *BT, supra,* at 1199. However, the lower court specifically held that the purpose of the 1970 Amendements, as viewed by the court, runs counter to appellant's argument, stating, at 1200, App. B—21,

> . . . the Florida statutes at issue here, by drastically curtailing the rights of foreign bank holding companies and their subsidairies to engage in banking-related businesses in this Florida, are at least inconsistent with, if not contrary to, the desires of Congress.

Courts have disagreed as to implications of the 1970 Amendments, and as to congressional intent and purpose behind them. *Compare National Courier Association v. Board of Governors, supra,* at 1236 with *Alabama Association of Insurance Agents v. Board of Governors,* 533 F.2d 224, 239 (5th Cir. 1976), *modified on other grounds,* 558 F.2d 729 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

The only known decision interpreting the intent and scope of the 1970 Amendements as they relate to the permissibility of activities in the *securities* area by bank holding companies and their non-bank subsidiaries is the recent case of *Investment Company Institute v. Board of Governors, supra.* This decision was not available at the time this Court entered its judgment and its Order altering the judgment.

In *Investment Company Institute,* the court, in vacating a regulation and interpretative ruling of the Federal Reserve Board, held that the Board is not empowered by Section 4(c)(8) of the Bank Holding Company Act to authorize bank holding companies and their non-bank subsidiaries to act as investment advisors to closed-end investment companies, since that function is not "so closely related to banking" as to warrant exemption from the Act's general prohibition against holding company involvement in other than banking activities.

Of significance is the Circuit Court of Appeals recognition of the underlying policies of the 1970 Amendments. As viewed by the court, the main thrust of the legislation was to prevent one-bank holding companies—which had been exempt from the 1956 Act—from entering businesses not related to banking. The burgeoning of one-bank holding companies at the time was thought to pose two separate dangers. First, there was concern that bank holding companies would improperly further the interests of their non-bank subsidiaries by abusing the power of bank subsidiaries. Second, and more importantly, Congress was concerned that the economy was becoming structured along the lines of the Japanese "zaibatsu" system, in which economic power is concentrated in a few gigantic power centers. See *Investment Company Institute, supra,* p. 39 of the slip opinion, and footnote 67.

The court below seems to reject appellant's contention that the 1970 Amendments did not change the original congressional purpose behind enactment of the Bank Holding Company Act of 1956, which was to limit the concentration of economic power in the hands of bank holding companies. See *BT, supra,* at 1200, App. B—20.

Because the 1970 Amendments did not affect the original intent of the 1956 Act to prevent the concentration of financial power by bank holding companies, it is not inconsistent to infer that the State's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. This issue is crucial to the banking industry, the national economy, and the public interest. Congress, at this moment, is engaged in an important debate concerning the function and relation of banking to the economy.

The question presented to this Court is very substantial, affecting, as it does, the relation between federal and state regulation of banking holding company expansion into banking related activities.

2. Florida Statutes § 660.10(1977)

In holding § 660.10, Florida Statutes, unconsitutional, the lower court struck down a statute which had been the governing law of Florida for over 50 years, and which is similar to statutes enacted in other jurisdictions for similarly lengthy periods. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries. See 1 *Scott on Trusts* § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary,* 26 A.L.R. 3d 1019 (1969). For examples of decisions applying such exclusionary statutes, see *Farmers' Loan and Trust Co. v. Smith,* 74 Comm. 625, 51 A. 609 (1902); *Re Avery's Estate,* 45 Misc. 529, 92 N.Y.S. 974 (1904); *Gould v. Board of Home Missions,* 167 N.W. 777 (Neb. 1918). In question is the right of a state to bar a foreign corporation from doing business within its boundaries as recognized in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168,19, L. Ed. 357 (1869).

Florida Statutes § 660.10 (1977) not only prohibits out-of-state corporations from performing certain fiduciary activities, it also prohibits *all* corporations from engaging in these activities, domestic and foreign, except Florida corporate trust companies *with trust powers* and national

banks located in Florida with specific trust powers. Apart from the prohibition contained in § 659.141(1), Florida Statutes (1977), § 660.10 *does not* prohibit Plaintiffs from competing, through a Florida subsidiary, with Florida trust companies. Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida, and obtain trust powers. Trust powers can only be obtained through licensing and chartering provisions of Florida Statutes § 659.05(1977), after the Department of Banking and Finance finds that the proposed trust company has complied in good faith with all the requirements of law. Therefore, § 660.10, apart from § 659.141(1), does not "cordon off Florida trust companies from competition by out-of-state concerns." It merely requires an out-of-state entity to establish a Florida subsidiary corporation if it wants to engage in trust activities in Florida.

Plaintiffs attack on § 660.10 can only be viewed in *conjunction* with § 659.141(1). As noted by the Fifth Circuit Court of Appeals when in *BT Investment Managers, Inc. and Bankers Trust New York Corporation v. Gerald A. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) it considered the applicability of the "abstention doctrine" in the case at bar,

> . . . — it must be remembered that appellants [plaintiffs] focus their attack upon a single statute. . .[28]

28. Although Fla. Stat. §§ 659.141(1) and 660.10 are both attacked, § 660.10 merely enumerates various trust powers and duties and is attacked only insofar as it compliments § 659.141(1).

Thus, the lower court may have gone too far in declaring § 660.10 unconstitutional.

There is no constitutional impediment to a state refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business is to be done. In *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 400, 444, 51 S.Ct. 201, 202 (1931), the Supreme Court affirmed an order of the Virginia Corporation Commission that denied to the appellant a certificate of authority to do an intrastate express business in Virginia. The appellant was a Delaware corporation. The Virginia Constitution prohibited foreign corporations from doing an intrastate express business, limiting such activities to Virginia corporations. Appellant attacked the prohibition as being a direct burden upon interstate commerce, and in violation of the Fourteenth Amendment in that the requirement of the Virginia Constitution "deprives the appellant of its right to sue in the federal courts and to remove suits to them on the ground of diversity of Citzenship."

The Supreme Court, in rejecting the commerce clause attack, stated:

> Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce, and it is presumed to be constitutional. . . We may add that . . . the difficulties created by the

Constitution of Virginia probably will not prove hard to overcome when it is found that they must be met. (282 U.S. at 444.)

The Supreme Court also rejected the Fourteenth Amendment argument, stating:

The appellant is not deprived of any rights. It can do all that it ever could. If it sees fit to acquire a new personality under the laws of Virginia it cannot complain that the new person has not the same rights as itself. Of course there can be no suggestion here that the clause in the State Constitution was adopted for a sinister end. And unless it was, the inability of the new State corporation to do all that the appellant could have done is only the legitimate incident of a legitimate act. (282 U.S. at 444.)

Section 660.10, by analogy, does not "take anything from anybody," nor is the State of Florida "attempting to go beyond its power by indirection." Section 660.10 merely refuses to grant *any* corporation, foreign or domestic, authority to transact local trust business without "taking out a charter from the jurisdiction within which that business must be done." It is not so much a prohibition or exclusion as a resonable and permissible method of effective regulation in an important area of fiduciary activities.

An important issue is presented to this Court, the determination of which substantially affects many similar state statutes in other jurisdictions. The question involves an area of traditional state concern, regulation of fiduciary activities.

3. Florida Statutes § 649,141(1)

In light of Philadelphia v. New Jersey, ____U.S. ____, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)

The lower court decision is heavily premised on the court's interpretation and application of *Philadelphia v. New Jersey, supra.* As noted by the lower court, *BT, supra,* at 1196,

Accordingly, the chief inquiry in the instant case is whether §§ 659.141(1) and 660.10 are 'basically . . . protectionist measure[s], or whether [they] can fairly be viewed as law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.' *Philadelphia v. New Jersey,* ____U.S. at ____, 98 S.Ct. at 2536, 57 L.Ed.2d at 482.

In determining a Commerce Clause issue, under the general rule, a court must inquire, (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but when discrimination against commerce is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscrimination alternatives adequate to preserve the local interests at stake. *Hughes v. Oklahoma,* ____U.S.____, 99 S.Ct. 1727, ____L.Ed.2d____, (1979).

The lower court, specifically found, *BT, supra,* at 1196,

> The record here, though sparse, is sufficient to indicate conclusively the discriminating nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, Supra,* this parochial legislation must be deemed per se unconstitutional.

The facts of *Philadelphia, supra,* did indeed establish discrimination against articles of commerce coming from outside the State. The New Jersey statute attacked prohibited the importation of most solid or liquid waste which *originated* or was collected outside the territorial limits of the State. There was no reason, apart from their origin to treat them differently.

However, in the case at bar, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operation of which are principally conducted outside this state" may not control business performing banking and closely related activities in the state. A foreign corporation whose operations were principally conducted in this state could control a bank or investment advisory business. Conversely, a domestically incorporated business which had its principal operations out of the state would feel the same effect of the prohibition. The burden thus falls equally on foreign and domestic businesses alike.

As stated by this Court in *Exxon Corporation* v. *Governor of Maryland,* ____U.S.____, 98 S.Ct. 2207, 2215, 57 L.Ed.2d 91 (1978), the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. In *Exxon, supra,* this Court upheld a Maryland statute which prohibited any corporation that produced or refined petroleum products from operating a retail service station within the state. The oil companies argued that the effect of the act was to create a protected market for Maryland's independent dealers, since there were no local refiners or producers. This argument was rejected. Pointing to the relevant market, retail service stations, this Court noted that the act did not bar interstate dealers who were not refiners or producers.

> In fact, the act creates no barriers whatsoever against interstate independent dealers, it does not prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state companies in the retail market . . . the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against inter-state commerce. Id at 100.

Section 659.141(1) does not prohibit the flow of interstate services. There is certainly nothing on the record to suggest there are added costs on investment advisory services caused by this regulation. As far as the consumer is concerned, there is no distinction in the market place. Indeed, non-banking corporations whose principal place of business are out of the state may supply investment advisory services. The Commerce Clause protects the market, *not* the specific marketer.

The policy of limiting the entry into the state of out-of-state companies is consistent with congressional legislation. To declare § 659.141(1) unconstitutional would be to substantially undermine the dual system of banking, and in effect, deprive the state of the right that Congress has given them to regulate participation in the financial community within their borders.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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DATE: July 9th, 1979

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, *ORDER*

Defendant.

In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141 (1) (1977) are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the provisions of the first sentence of Florida Statutes § 659.141(1) (1977). The clerk of the court is directed to enter judgment accordingly.

DONE AND ORDERED this 15th day of December, 1978.

/s/ Paul H. Roney
PAUL H. RONEY
CIRCUIT JUDGE

/s/ Winston E. Arnow
WINSTON E. ARNOW
CHIEF JUDGE

/s/ William Stafford
WILLIAM STAFFORD
DISTRICT JUDGE

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of the
State of Florida and Commissioner of
Banking of the State of Florida,

Defendant.

OPINION

Before RONEY, Circuit Judge, ARNOW, Chief District Judge, and STAFFORD, District Judge.

STAFFORD, District Judge.

Plaintiffs Bankers Trust New York Corporation (BTNYC) and BT Investment Managers (BTIM), have brought this action seeking a declaration that Florida Statutes § 660.10 and a portion of Florida Statutes § 659.-141(1) contravene the United States Constitution and for an injunction restraining their enforcement. Jurisdiction, which is not contested, is founded upon 28 U.S.C. §§ 1331 and 1343(3). This three-judge district court was convened pursuant to 28 U.S.C. § 2281.[1]

The case was submitted to the court upon a stipulation

of facts by the parties, and a final hearing was conducted on September 1, 1978. Upon consideration of the matters presented to the court, we hold that the challenged portion of Florida Statutes § 659.141(1), which prohibits a bank, trust company, or holding company that principally conducts its business outside the State of Florida from owning or controlling a business organization in this state which furnishes investment advisory services, violates the commerce clause, Article I, § 8, of the Constitution.[2] Similarly, we hold invalid under the commerce clause Florida Statutes § 660.10, which bars all corporations except banks and trust companies incorporated in Florida and national banks located in Florida from exercising various trust powers and duties in this state.[3] Since the determination that the subject statutes offend the commerce clause is sufficient to dispose of the controversy between the parties, we express no opinion as to the validity or invalidity of the statutes under any other constitutional theory proferred by plaintiffs.[4]

BTNYC is a corporation organized under the laws of New York and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, et seq. BTIM is a corporation organized under the laws of Delaware, and is a wholly-owned subsidiary of BTNYC. BTIM qualified to do business in Florida on November 27, 1972, and plans to locate an office in the city of Palm Beach, Florida.

Defendant Gerald A. Lewis is the incumbent Comptroller and Commissioner of Banking of the State of Florida. The Florida Bankers Association (FBA or amicus) has been granted leave to appear in this action as amicus

curiae to argue, along with defendant, in favor of the validity of the challenged statutes.

The factual history of this litigation opens with the 1970 amendments to the Bank Holding Company Act, and specifically the amendment to § 4(c)(8) of the Act, 12 U.S.C. § 1843 (c)(8). Prior to 1970 § 4(c)(8) provided that a bank holding company could not acquire ownership or control of any company which is not a bank or bank holding company, except for "any company *all the activities of which are of a financial, fiduciary, or insurance nature* and which the Board [of Governors of the Federal Reserve System] . . . by order has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto . . ." (emphasis added).

The 1970 amendment to this provision, P.L. 91-607, Title I, § 103(4), 84 Stat. 1763, significantly expanded the statutory definition of activities deemed to be "so closely related to banking . . . as to be a proper incident thereto." Deleted from the statutory language was the former limitation to activities of a "financial, fiduciary, or insurance nature." Following the amendment bank holding companies were authorized to own or control

> any company the activities of which the Board . . . has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be ex-

> pected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced by the acquisition, in whole or in part, of a going concern.

12 U.S.C. § 1843(c)(8).

The statute grants the Board of Governors of the Federal Reserve System authority to adopt regulations more specifically defining those business activities "so closely related to banking . . . as to be a proper incident thereto." The Board has determined that [p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "[a]cting as investment or financial advisor" are such activities. 12 C.F.R. § 225.4(a)(4) & (5).[5]

Acting on the basis of the post-1970 federal bank holding company statutes and regulations, BTNYC applied to the Board of Governors of the Federal Reserve System on October 3, 1972, for authority indirectly to engage *de novo* in the performance of investment advisory services through its subsidiary BTIM, at an office to be located in Palm Beach, Florida.

While the application was pending, the Florida Legislature, convened in special session for the purpose of considering matters unrelated to this lawsuit, also passed a bill amending Florida Statute § 659.141(1) in such a

manner as to remove BTNYC's right under state law to engage in the investment advisory business in Florida. Laws of Florida 1972, ch. 72-726. It is apparent that the bill was hurriedly enacted at the instance of the FBA and defendant's predecessor in office in response to BTNYC's application; the Board so found,[6] and defendant and the FBA have offered no evidence to the contrary.

Until passage of the amendment to § 659.141(1), that statute forbade any "bank, trust company or holding company, the operations of which are principally conducted outside [Florida]" from acquiring control over "any business organization having a place of business in [Florida] where or from which it furnishes investment advisory services *to trust companies or banks* in [Florida]" (emphasis added). The amended statute eliminated all reference to trust companies or banks, thereby extending the prohibition on the furnishing of investment advice to the giving of advice to *any* person from a place of business located in this state.

On April 26, 1973, the Board issued an order rejecting BTNYC's application. The Board's reasoning bears partial recitation here:

> Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have procompetitive effects, and consequently should be

> viewed more favorably than the commencement of an activity through the acquisition of an existing concern" and "where a bank holding company enters a new market *de novo* . . ., its desire to succeed in its new endeavor is more likely to be competitive". However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida.

Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 365 (1973). Under the authority of *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), and § 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, the Board concluded that it was required to deny BTNYC's proposal on the ground that it was prohibited by state law.

Subsequent to the Board's order plaintiffs filed this lawsuit. Count I of the complaint asks for declaratory and injunctive relief against the operation of § 659.141(1). Count II seeks identical relief against the joint operation of §§ 659.141(1) and 660.10, which together prevent BTNYC from operating a subsidiary trust company in the State of Florida. Concerning Count II, the complaint alleges, and the parties to this lawsuit have stipulated, that,

> But for the existence of the challenged statutes, Bankers Trust New York Corporation would have applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage,

> through a subsidiary trust company having a national bank charter or a Florida state charter, in the activity of performing or carrying on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.

Stipulation filed May 11, 1978, at 2-3. The parties have further stipulated that the "enforcement, or threatened enforcement" of §§ 659.141(1) and 660.10" has caused [BTIM and BTNYC] injury, loss of potential profits and loss of opportunity for corporate gain." *Id.* at 3.

Turning to the merits of the present controversy, it is necessary initially to dispose of the threshold question whether the business activities prohibited by §§ 659.141(1) and 660.10 constitute interstate commerce. Defendant insists that since the challenged statutes merely forbid foreign corporations from doing business *in this state*, only *intra*-state commerce is affected.[7] This claim is unconvincing. While the phrase "interstate commerce" does not "comprehend that commerce, which is completely internal, . . . and which does not extend to or affect other states," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), the notion of what is "completely internal" traditionally has been strictly and narrowly confined. For a business activity to come within the scope of the commerce clause, it need only have a substantial effect on interstate commerce. *See Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard*

v. *Filburn*, 317 U.S. 111 (1942). As long as such an effect on interstate commerce is shown to exist, it is immaterial whether the activity in question is itself either wholly or primarily intrastate in nature.

The necessary effect on interstate commerce has been demonstrated here even though no direct evidence to prove such an effect has been presented.[8] This conclusion is compelled, first, because of the pervasive range of federal regulation of bank holding companies and their subsidiaries through the powers vested in the federal government under the commerce clause. This extensive regulation must constitutionally be founded upon a nexus between the provision of financial services and commerce between the states. No party to this case has contended that the connection to interestate commerce of the activities involved here is so insubstantial as to rob Congress of its authority to regulate in this field.[9]

Second, the complaint alleges, and plaintiffs have contended throughout the instant proceedings, that they desire to engage in interstate commerce and that the very nature of the business they seek to conduct in Florida would necessarily implicate a substantial volume of interstate trade and communications. The typical clients plaintiffs intend to serve in the Palm Beach office of BTIM are persons vacationing in Florida who during the bulk of the year rely on BTNYC to handle their investment portfolios and who would likely wish to obtain investment advice during vacation from a Florida office of the same company. These, of course, are people who have crossed state lines in order to reach Florida. Even more significantly, the investment services rendered by plaintiffs would in the due course of business affect the stocks and securities

of numerous corporations. The continual use of interstate and international mail, telephone, and wire communications would also be a necessary part of plaintiffs' business. Taken together, these probable incidents of plaintiffs' proposed activities more than demonstrate that interstate, as well as intrastate, commerce would be affected.

The essential disputes between the parties as to the commerce clause issue are as follows. Plaintiffs charge that §§ 659.141(1) and 660.10 are blatantly undisguised protectionist measures designed to shield Florida banking, trust and investment advisory firms from free competition with foreign businesses. Consequently, plaintiffs assert, the statutes discriminate against and unduly burden interstate commerce in violation of the commerce clause.

Defendant and the FBA deny this claim and insist that §§ 659.141 and 660.10 serve significant and legitimate local interests justifying any possible burden upon interstate commerce. Furthermore, defendant and the FBA place great reliance on certain provisions of the Bank Holding Company Act which are claimed to affirmatively approve state prohibitions upon the entry into local markets of foreign bank holding companies and their subsidiaries.

The general constitutional principles governing a claim of interference with interstate commerce are well established. Although the commerce clause grants Congress the authority "[t]o regulate Commerce . . . among the several States," it has long been understood that, in the absence of conflicting federal legislation on a subject of potential regulation, the states retain a "residuum of power" to adopt their own regulations concerning that subject. *Southern*

Pacific Co. v. *Arizona,* 325 U.S. 761, 767 (1945). *See also Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333 (1977). That power, however, must be exercised within the restraints imposed by the commerce clause, *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 481 (1978); *Raymond Motor Transportation* v. *Rice,* ____U.S. ____, 54 L.Ed.2d 664, 674 (1978), and must not be used to create barriers to the free passage of interstate commerce, *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299 (1851); *Raymond Motor Transportation, supra.* Thus, "in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the [federal courts] in absence of congressional guidance [are]called upon to make 'delicate adjustment of the conflicting state and federal claims' H.P. Hood & Sons v. Du Mond, [336 U.S. 525, 553] 93 L.Ed. 865, 69 S Ct 657 (Black, J., dissenting)." *A & P Tea Co.* v. *Cottrell,* 424 U.S. 366, 371 (1976).

The guiding principles for effecting the necessary accomodation or balancing between competing national and state interests in light of the purpose of the commerce clause are best stated as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 US 440, 443, 4 L Ed 2d 852, 80 S Ct 813, 78 ALR2d 1949. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden

> that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. *Bruce Church, Inc.,* 397, U.S. 137, 142 (1970). *See also Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976); *A & P Tea Co.* v. *Cottrell, supra.*

An entirely dissimilar set of considerations come into play, however, where it appears a state statute is no more than discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce. As to regulations of this nature, the Supreme Court has flatly stated that "where simple economic protectionism is effected by state legislation, *a virtually per se rule of invalidity* has been erected." *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 481 (1978) (emphasis added), citing *Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949); *Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511 (1935); *Buck* v. *Kuykendall,* 267 U.S. 307 (1925). This inflexible rule is applied in order to make meaningful the constitutional concept of the United States as an economic whole, rather than a feuding collection of economically Balkanized states. As expressed in *Hood & Sons* v. *Du Mond, supra*:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig,

> 294 US 511, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

336 U.S. at 537-38. Accordingly, the chief inquiry in the instant case is whether §§ 659.141(1) and 660.10 are "basically . . . protectionist measure[s], or whether [they] can fairly be viewed as law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 57 L.Ed.2d at 482.

The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, supra,* this parochial legislation must be deemed per se unconstitutional.

Defendant and the FBA argue strenuously, however, that the statutes are justified by an overriding legislative purpose of furthering competition by preventing economically powerful out-of-state banking interests from gaining a stranglehold on the Florida market. The FBA, for example, contends the Florida Leglislature, in amending § 659.141(1), "took action designed to attain the legitimate goal of protecting the public from the threat posed by the accumulation and concentration of economic power." Reply Memorandum of Law of Amicus Curiae, at 10. Doubtlessly, regulatory statutes seeking to curb anti-

competitive abuses are within the proper exercise of the general police powers of the State of Florida. We cannot agree, however, that the mere invocation of this legitimate interest, without more, is sufficient to save discriminatory legislation of the type we deal with here.[10]

Contentions based upon the legislative purpose motivating passage of the statutes must fail primarily because they are irrelevant once the discriminatory character of a state regulation is established. In *Philadelphia* v. *New Jersey, supra,* Mr. Justice Stewart recited the principle that

> [T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch 363 violates this principle of nondiscrimination.

The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous competition . . . or to create jobs by keeping

> industry within the state, . . . or to preserve the State's financial resources from depletion by fencing out indigent immigrants. . . . In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.

57 L.Ed.2d at 483-84 (citations omitted).

Here, it is amply evident that, even if the motive of the Florida Legislature was to promote competition in this state in the affected businesses, the means chosen for doing so are impermissible. There is no evidence to suggest that foreign banks and bank holding companies or companies which principally conduct their business outside the state constitute any more of a threat to free competition in Florida than firms located in this state. The available evidence, in fact, is directly to the contrary, at least as far as § 659.141(1) is concerned. The Board of Governors of the Federal Reserve System determined that, if it were not for the amendment of § 659.141(1), BTNYC's application to engage in the investment advisory business through its subsidiary BTIM would have been approved. By law, this determination may only have been made upon a finding by the Board that the business activity sought to be performed by plaintiffs could "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." 12 U.S.C. § 1843 (c)(8). The Board specifically found there was no evidence plaintiffs' entry into the investment advisory field would harm competition and concluded that plaintiffs'

proposed business would tend to have pro-competitive effects. 59 Fed.Res.Bull. at 365.

Florida unquestionably may act by legislation to control or prevent undue concentrations of economic power in the banking, investment and trust businesses. In order not to run afoul of the commerce clause, though, this legislation must impact evenhandedly upon in-state and out-of-state firms alike. Sections 659.141(1) and 660.10 place the full weight of the purported state concern for competition upon foreign companies, leaving unchecked any possible abuses by Florida companies. Where, as here, there is no evidence beyond simple speculation that foreign companies pose any greater danger to competition than do Florida firms, the former may not be singled out for prohibition. Defendant and the FBA have not attempted to demonstrate that non-discriminatory alternatives to the statutes challenged here would be unavailable or ineffective, *A&P Tea Co.* v. *Cottrell,* 424 U.S. 366 (1976); *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951); indeed, the State of Florida possesses broad authority under its police powers to regulate the business activities of both Florida and non-Florida companies in this state to ensure that competition is fostered.

Moreover, the record is replete with indications that the legislative intent behind § 659.141(1), if not § 660.10, was to discriminate against interstate commerce. While no official record of legislative history or statement of legislative purpose accompanied the passage of either statute, the order of the Board of Governors of the Federal Reserve System in this case recounts the telling circumstances under which the bill amending § 659.141(1) was passed. The Board stated, "There appears to be tacit agreement that

the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." 59 Fed. Res. Bull. at 365.[11] The Board further determined that, "It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in Sepember, 1972, triggered the action of the Florida legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry." 59 Fed. Res. Bull. at 366.

The Board also found that the legislation had been passed at the urging of the FBA and defendant's predecessor in office, a highly significant circumstance in determining whether discrimination against interstate commerce exists. As expressed in *Hunt* v. *Washington State Apple Advertising Comm'n, supra:*

> Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended by product and there are some indications in the record to that effect.
>
> The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed. . . .*"

432 U.S. at 352 (emphasis added).

The final argument interposed by defendant and the FBA in favor of the validity of §§ 659.141(1) and 660.10 is that Congress, through certain provisions of the Bank Holding Company Act, 12 U.S.C. § 1841 et seq., has affirmatively consented to Florida's prohibition on the entry of foreign bank holding companies and their subsidiaries into this state. It has long been held that Congress, under its powers over interstate commerce, may legitimately approve regulations by the states that would otherwise violate the commerce clause. *See, e.g., Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946). Defendant and the FBA specifically rely here upon 12 U.S.C. §§ 1842(d) and 1846 as constituting congressional authority for the discriminations against interstate commerce effected by the state laws being challenged.

Of the two federal statutes, § 1846 is the more easily disposed of. It provides:

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

This language accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act. In no wise does it pass on to the states the power to adopt regulations on any subject which would otherwise be contrary to the commerce clause. The remarks of the Fifth Circuit in the recent case of *Great Western*

United Corp. v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), are both instructive and dispositive:

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. See, e.g., the Wilson Act of 1890, 26 Stat. 313. Congress has also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state regulation. See the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 et seq. The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

Id. at 1281. Similarly, 12 U.S.C. § 1846 does not explicitly speak to exempting state banking and bank holding company regulations from the limitations of the commerce clause, and no such exemption should be read into the statute by this court.

Section 1842(d) of Title 12 is of no greater avail to defendant and amicus than is § 1846. That section reads:

> (d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under ths section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of

> any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the asquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

By its terms § 1842(d) prohibits a bank holding company from acquiring an additional *bank* in any state in which the business of its subsidiaries is not principally conducted. It does not specifically consent to any state's attempt to bar out-of-state bank holding companies from acquiring other companies within that state which are engaged in activities "so closely related to banking or managing or controlling banks as to be a proper incident thereto," within the meaning of 12 U.S.C. § 1843(c)(8).

Defendant and amicus argue, however, that the ability to prohibit the acquisition of banks within a particular state must necessarily carry with it the abilty to prohibit the acquisition of companies involved in closely related activities. Otherwise, they claim, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. Defendant and the FBA draw support from the

original congressional purpose behind enactment of the Bank Holding Company Act in 1956, that being to limit the concentration of economic power in the hands of bank holding companies. *See Alabama Ass'n of Insurance Agents* v. *Board of Governors*, 533 F.2d 224, 231 (5th Cir. 1976).

This argument disregards both the plain meaning of the statute and the most recent expressions of congressional intent. The legislative histories of the Bank Holding Company Act and the 1966 and 1970 amendments to the Act contain nothing to support the conclusion that a state's authority to forbid foreign companies from acquiring banks within that state includes the right also to forbid them from acquiring companies offering services closely related to banking. Moreover, although defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies), the purpose of the 1970 amendments runs counter to their arguments. The 1970 amendments permit a bank holding company to obtain "any company the activities of which . . . are so closely related to banking . . . as to be a proper incident thereto," and not just companies "all the activities of which are of a financial, fiduciary, or insurance nature," as the Act provided prior to 1970. The congressional history of the amendments makes clear that Congress in 1970 intended to expand the range of business activities in which bank holding companies could engage, giving them greater flexibility and latitude. *See National Courier Association* v. *Board of Governors*, 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act*, 60 Geo. L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments*

of 1970: The Scope of Banking Activities, 71 Michigan L. Rev. 1970 (1973); Legislation Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971). The Florida statutes at issue here, by drastically curtailing the rights of foreign bank holding companies and their subsidiaries to engage in banking-related businesses in this state, are at least inconsistent with, if not contrary to, the desires of Congress.

In addition, it is difficult to read § 1842(d), which specifically consents only to state prohibition of the acquisition of *banks* by out-of-state holding companies, as authorizing prohibition of the acquisition of banking-related businesses. "Bank", as used in the Bank Holding Company Act, is a term of art with a definite meaning: "Any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c). If Congress had intended to allow state prohibition of the acquisition of non-banking subsidiaries, it could easily have so provided; since § 1842(d) refers only to "banks," the plain meaning of its language must prevail. Thus, § 1842(d) contains no authority for concluding that a state may bar foreign bank holding companies from acquiring non-banking subsidiaries, as well as banks, within its jurisdiction.

In holding that Florida Statutes § 660.10 and a portion of Florida Statutes § 659.141(1) are unconstitutional, we intend no disparagement of the traditional authority of Florida and all other states under their police powers to fairly and evenhandedly regulate banks, bank holding companies, trust companies and like financial institutions. As amicus has so vigorously pointed out, the banking

trade historically has been subject to a system of dual federal and state regulation, a system which Congress has endeavored to preserve over the years. Sections 1842(d) and 1846 of Title 12, and similar laws, represent the statutory embodiment of this national policy. Nevertheless, when Congress, in the exercise of its paramount authority over commerce, has not explicitly countenanced the type of overt discrimination against interstate commerce involved in this case, the judiciary must intervene in order to ensure that the freedom of trade between the states guaranteed by the commerce clause is protected.[12]

Accordingly, an order will issue declaring that Florida Statutes § 660.10 and the affected portion of Florida Statutes §659.141(1) are invalid as violative of the commerce clause and enjoining the further enforcement of § 659.141 (1) against plaintiffs. Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring the enforcement of Florida Statutes § 660.10 would be premature, and therefore inappropriate, at this time.

FOOTNOTES TCA 73-184

1. This action was filed on October 24, 1973, and thus the propriety of empanelling a three-judge court was unaffected by the repeal of 28 U.S.C. § 2281 in 1976. Pub. L. 94-381, Aug. 12, 1976, 90 Stat. 1119.

2. The pertinent portion of Florida Statutes § 659.141(1) provides:

> (1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indiectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state.

3. Florida Statutes §660.10 provides:

> All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows:
>
> (1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent be original or ancillary; provided, that if the executor or administrator of the estate of a nonresident decedent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicile of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by s. 734.30.
>
> (2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.
>
> (3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.
>
> (4) As trustee of any real estate in this state or any interest

therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrustees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state where located as fiscal agent, transfer agent or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument cover-

ing real or personal property in the state proposed to be given or hereafter or heretofore given to such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

It should be noted that both Florida Statutes § 660.10 and Florida Statutes § 659.141 are affected by the Florida Regulatory Reform Act of 1976, Florida Laws 1976, ch. 760178, Florida Statutes § 11.61, and are slated to be repealed effective July 1, 1980, unless the Legislature decides prior to January 1, 1980 to retain them.

4. In addition to the commerce clause the complaint alleges three other constitutional grounds upon which the statutes are said to be invalid: (1) denial of equal protection; (2) denial of substantive due process; and (3) violation of the supremacy clause, Article VI, clause 2. Plaintiffs abandoned reliance on the last two of these contentions prior to the final hearing in this case.

5. 12 C.F.R. § 225.4(a)(4) & (5) provides in relevant part:

(a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), in the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial advisor to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940, to an investment company registered under that Act; (iii) providing portfolio investment advice to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.

6. *See* Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 366 (1973).

7. The FBA does not join in this contention, and its memoranda of law appear to concede that matters involving interstate commerce are at issue in this litigation.

8. The absence of direct evidence is attributable to the fact that the challenged statutes forbid plaintiffs from engaging in business, and thus there is no factual background to demonstrate what the actual effect of plaintiffs' proposed activities on interstate commerce would be.

9. *Katzenbach* v. *Morgan, Wickard* v. *Filburn,* and most other cases which hold that a business activity need only have a "substantial effect" on interstate commerce in order to come within the parameters of the commerce clause have dealt with the permissible extent of federal regulation. It might be questioned whether the commerce clause ought to be accorded a more confined scope where the issue at hand is whether to restrict or forbid state regulation of the incidents of commerce, thus allowing the states greater legislative leeway. The Supreme Court, in *Philadelphia* v. *New Jersey,* ____U.S.____, 57 L.Ed.2d 475, 480-81 (1978), specifically rejected this "two-tiered definition" of commerce. The court there concluded that the states are subject to "Constitutional scrutiny" whenever they attempt to enter any regulatory field in which Congress has power to regulate under the commerce clause. *Id.* at 481.

10. Where a state statute is challenged as violative of the commerce clause, a federal court is not permitted merely to assume that the statute serves an asserted state interest, as may be done when the court is confronted with an equal protection challenge to state regulation, *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961). "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' Kansas City Southern R.Co. v. Kaw Valley Dis-

trict,[233 U.S. 75], 79; Buck v. Kuykendall, 267 U.S. 307, 315." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945). *See also Raymond Motor Transportation* v. *Rice,* ____*U.S.*____, 54 L.Ed. 2d 664, 675-78 (1978).

11. In its opinion in this case the Fifth Circuit Court of Appeals was even more blunt in its appraisal of the purpose and effect of Florida Statutes § 659.141(1), terming it "a brazen attempt to prevent out-of-state competition." *BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950,954 n. 13 (1977).

12. We recognize, too, as defendant and amicus have noted, that many other states have passed laws similar in nature to § 660.10. *See* Annotation, *Eligibility of Foreign Corporation to Appointment as Executor, Administrator, or Testamentary Trustee,* 26 ALR 3d 1019 (1969). In addition, § 660.10 has survived on the statute books without constitutional challenge for approximately 50 years. A statute's longevity or commonplace nature, however, is an insufficient rationale for justifying its demonstrated discrimination against interstate commerce.

APPENDIX C

STATUTES AND RULES

1. The pertinent portion of Florida Statutes § 659.141 (1) provides:

> (1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state.

2. Florida Statutes § 660.10 provides:

> All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state as follows:
>
> (1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent be original or ancillary; provided, that if the executor or administrator of the

estate of a nonresident decendent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicle of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by § 734.30.

(2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.

(3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.

(4) As trustee of any real estate in this state or any interest therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit

shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrutees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument covering real or personal property in the state proposed to be given or hereafter or heretofore given to

such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

3. 12 U.S.C. § 1842(d) provides:

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting

shares of, interest in, or all of substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. The relevant portion of 12 U.S.C. § 1843 provides:

§ 1843. Interests in nonbanking organizations (a) Ownership or control of voting shares of any company not a bank; engagement in activities other than banking. Except as otherwise provided in this Act no bank holding company shall—

(1) after the date of enactment of this Act [enacted May 9, 1956], acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to

May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment [enacted Dec. 31, 1970], after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph: . . . (c) Exempt tions. The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501], or to any labor, agricultural, or horticultural organziation to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern;

5. 12 U.S.C. § 1846 provides:

§ 1846. Reservation of rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (May 9, 1956, c. 240 § 7, 70 Stat 138).

6. 12 C.F.R. § 225.4(a)(4) and (5) provides in relevant part:

> (a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), In the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial adviser to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940,

to an investment company registered under that Act; (iii) providing portfolio investment advise to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.

APPENDIX D

D1

Judgment on Decision by the Court

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

Civil Action File No. TCA 73-184

BT INVESTMENT MANAGERS, INC. and
BANKERS TRUST NEW YORK CORPORATION

vs.

GERALD A. LEWIS, Comptroller of the
State of Florida and Commissioner of
Banking of the State of Florida

This action came on for hearing before the Court, Honorable Paul H. Roney, United States Circuit Judge; Honorable Winston E. Arnow, Chief United States District Judge; and Honorable William Stafford, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That defendant's motion for clarification, reconsideration and to alter and amend judgment, be and the same hereby is GRANTED IN PART. This court's order of December 15, 1978 is altered to read:

> In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida

Statutes § 659.141(1) (1977), excluding that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside this state, from acquiring, owning or controlling a bank having a place of business in this state, are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)(1977).

The motion is DENIED in all other respects.

Dated on this 22nd day of March, 1979.

MARVIN S. WAITS, Clerk
By /s/ Ma'Su Sweeney
Deputy Clerk

OFFICE OF THE CLERK
U.S. DISTRICT CT.
NORTH DIST., FLA.
TALLAHASSEE, FLA.

1979 MAR 22 PM 4:17

FILED

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC.
and BANKERS TRUST NEW YORK
CORPORATION,

Plaintiffs,

vs. TCA 73-184

GERALD A. LEWIS, Comptroller of
the State of Florida and
Commissioner of Banking of the
State of Florida, *ORDER*

Defendant.

Defendant has filed a motion for clarification, reconsideration, and to alter and amend judgment. Upon consideration of said motion, the court notes that the order dated December 15, 1978 appears to grant relief broader in scope than that warranted by the opinion of the same date. Accordingly, the order is clarified as set out below.

OFFICE OF CLERK
U.S. DISTRICT C
NORTH DIST., FLA.
TALLAHASSEE, FLA.

1979 MAR 22 PM 2:32

FILED

The remainder of defendant's motion and the memoranda of defendant and amicus in support of the motion rely chiefly upon language found in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), and *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), to the effect that a state may wholly exclude foreign corporations from doing business in the state. As expressed in *Wheeling Steel*:

> Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The state may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. Hanover F. Ins. Co. v. Harding, 272 U.S. 494, 507, 7 L.Ed. 372, 379, 47 S.Ct. 179; Connecticut Gen. L. Ins. Co. v. Johnson, 303 U.S. 77, 79, 80, 82 L.Ed. 673, 676, 677, 58 S. Ct. 436.

337 U.S. at 571. The very language relied upon by defendand and amicus, however, belies their argument, for *Wheeling Steel* clearly holds that a state may exclude foreign corporations *so long as* the state does not breach any specific constitutional limitations upon its power to act, such as the commerce clause. It is well established "that a corporation authorized by the State of its creation to engage in interstate commerce 'may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce.'" *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 203-04 (1914), *quoting Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, 27 (1909); *accord, Hanover Insurance Co.* v. *Harding*, 272 U.S. 494, 507 (1926); *Looney* v. *Crane Co.*, 245 U.S. 178, 188 (1917).

Accordingly, it is

ORDERED AND ADJUDGED that defendant's motion for clarification, reconsideration and to alter and amend judgment be, and the same hereby is GRANTED IN PART. This court's order of December 15, 1978 is altered to read:

> In accordance with the opinion of the court entered this date, it is hereby declared that Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141(1) (1977), excluding that portion which prohibits a bank, trust company, or holding company, the operations of which are principally conducted outside this state, from acquiring, owning or controlling a bank having a place of business in this state, are unconstitutional as violative of Article I, § 8 of the United States Constitution. Defendant and his officers, agents, and employees are hereby permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977). The clerk of the court is directed to enter judgment accordingly.

The motion is DENIED in all other respects.

DONE AND ORDERED this 22nd day of March, 1979.

/s/ Paul H. Roney
PAUL H. RONEY
CIRCUIT JUDGE

/s/ Winston E. Arnow
WINSTON E. ARNOW
CHIEF DISTRICT JUDGE

E4

/s/ William Stafford
WILLIAM STAFFORD
DISTRICT JUDGE

APPENDIX F

F1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BT INVESTMENT MANAGERS, INC. AND BANKERS TRUST NEW YORK CORPORATION, PLAINTIFFS, VS. GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, DEFENDANT.	CIVIL ACTION NO. TCA 73-184

NOTICE OF APPEAL TO THE SUPREME COURT *OF THE UNITED STATES*

Notice is hereby given that GERALD A. LEWIS, Comptroller of the State of Florida, the defendant above named, hereby appeals to the Supreme Court of the United States from the Final Order declaring Florida Statutes § 660.10 (1977) and a portion of the first sentence of Florida Statute § 659.141(1) (1977), unconstitutional as violative of Article I, § 8 of the United States Constitution, and enjoining defendant from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977), entered in this action on December 15, 1978, and as altered and amended on March 22, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1253.

A notice of appeal to the United States Court of Appeal for the Fifth Circuit was filed by defendant on April 20, 1979, which was a protective appeal should the United States Supreme Court decide it does not have jurisdiction to hear the entire case. A Motion to Stay Further Proceedings in Appeal is simultaneously being filed in the United States Court of Appeals for the Fifth Circuit.

Dated: May 11, 1979

/s/ Eugene J. Cella
EUGENE J. CELLA
Counsel for Defendant-Appellant
General Counsel
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PROOF OF SERVICE

I, Franklyn J. Wollett, one of the attorneys for GERALD A. LEWIS, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on *11* day of May, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esquire and Stephen E. Day, Esquir of Mathews, Osborne, Ehrlich, McNott, Gobelman and Cobb, at 1500 American Heritage Building, Jacksonville, Florida 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copy in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esquire, of Akerman, Senterfit and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida 32802.

All parties required to be served have been served.

Dated: May 11, 1979.

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PROOF OF SERVICE

I, Franklyn John Wollett, one of the attorneys for GERALD A. LEWIS, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9 day of July, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esq. and Stephen E. Day, Esq. of Mathews, Osborne, Ehrlich, McNott, Gobelman and Cobb, at 1500 American Heritage Life Building, Jacksonville, Florida, 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copy in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esq., of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida, 32802.

All parties required to be served have been served.

Dated: July 9th 1979. Franklyn J Wollett

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Supreme Court, U. S.
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No. 79-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, Comptroller of the State of Florida, and Commissioner of Banking of the State of Florida,
Appellant,

v.

BT INVESTMENT MANAGERS, INC., et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of Florida

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BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT FOR THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

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IN THE

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No.

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Appellant.

v.

BT INVESTMENT MANAGERS, INC., et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of Florida

---

BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT FOR THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

This brief is filed under Rule 42(1) of the Rules of this Court, with the consent of all parties to the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida is reported at 461 F.Supp. 1187. The order of March 22, 1979, alter-

ing and amending the order of December 15, 1978, is not reported but is reprinted in an appendix to Appellant's Jurisdictional Statement.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth fully in the Appellant's Jurisdictional Statement, and are not repeated here.

QUESTIONS PRESENTED

1. Whether the court below was correct in holding that Florida Statutes § 660.10 (1977), forbidding out-of-state companies from exercising certain fiduciary powers in Florida, and the similar prohibitions of Florida Statutes § 659.141(1) (1977) which deal with investment advisory services, are invalid under the commerce clause of the United States Constitution.

2. Whether Congress in either section 3(d) or section 7 of the Bank Holding Company Act of 1956, as amended in 1970, 12 U.S.C. §§ 1842(d) and 1846 (1976), authorized Florida and other states to enact the prohibitions contained in Florida Statutes § 660.10 (1977) and that portion of Florida Statutes § 659.141 (1) (1977) which deals with investment advisory services.

INTEREST OF AMICUS

The Conference of State Bank Supervisors ("Conference") is an association composed of the officials of state governments responsible for the regulation of state-chartered banking institutions in every state of the United States and in Guam, Puerto Rico, and the

Virgin Islands. As of December 31, 1978, the Conference's members had jurisdiction over 10,275 state-chartered commercial and mutual savings banks with total resources of approximately $659 billion. The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958; and there are currently 5,960 such associate members.

The Conference's Board of Directors, consisting entirely of members (*i.e.*, state bank supervisors), has authority to supervise the Conference's affairs and determine its policies. The Board of Directors has authorized the filing of this brief, since the statutes held unconstitutional by the court below are comparable to statutes now in force in several states.[1]

STATEMENT

Bankers Trust New York Corporation ("BTNYC"), incorporated in New York State, is a "bank holding company" as defined in section 2(a) of the Bank Holding Company Act of 1956 ("1956 Act"), 12 U.S.C. § 1841(a) (1976). BTNYC organized and incorporated, in Delaware, BT Investment Managers, Inc. ("BTIM"), a wholly-owned subsidiary which subsequently qualified to do business in Florida.

Under section 4(c)(8) of the 1956 Act, a bank holding company like BTNYC has to secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (1976). The

[1] A list of state statutes comparable to those held unconstitutional by the court below appears in the attached Appendix to this brief; *infra* at 21.

Board of Governors, pursuant to its authority under the Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765, has determined that the performance of certain trust functions and the provision of investment or financial advice are "closely related activities." 12 C.F.R. §§ 225.4(a)(4) and 225.4(a)(5) (1978).

BTNYC applied to the Board of Governors for authorization to begin providing investment advisory services through BTIM in Florida. On April 26, 1973, the Board denied this application. 59 Fed. Res. Bull. 364, 367 (1973). The Board indicated that, while it favored the application in principle, it was required to deny approval [2] because of a recent enactment of the Florida Legislature which expanded a pre-existing prohibition against out-of-state control of a Florida business which sells investment advisory services to Florida banks and trust companies to include control of a business which sells such services to any customers. Florida Statutes § 659.141(1) (1977). *See* 59 Fed. Res. Bull. at 366-67.

BTNYC and its subsidiary, BTIM, did not appeal the decision of the Board of Governors. Rather, they attacked the constitutionality of § 659.141(1) by bringing an action against the Comptroller of Florida in the federal court, seeking declaratory and injunctive relief against the enforcement of Florida Statutes §§ 659.141(1) and 660.10 (1977).[3] A three-judge

[2] In denying the application because of the Florida law, the Board specifically relied on section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney Nat'l Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411 (1965).

[3] Section 660.10, which prevents all corporations except Florida bank and trust companies and national banks with trust powers and an office in Florida from performing certain trust functions,

federal district court agreed with BTNYC and BTIM, holding that both Florida statutes were unconstitutional under the commerce clause of the United States Constitution, thus finding it unnecessary to resolve other constitutional claims of the plaintiffs. *BT Investment Managers, Inc.* v. *Lewis,* 461 F. Supp. 1187, 1190-91, and n.4 (N.D. Fla. 1978).[4] The court also granted an injunction against further enforcement of § 659.141(1), but refused to grant a similar injunction against § 660.10 on the grounds that BTNYC had not yet attempted to set up a subsidiary trust service in Florida, although it desires to do so. 461 F. Supp. at 1201.

The court flatly held that both Florida statutes were *per se* unconstitutional, relying on *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). 461 F. Supp. at 1196. The court asserted that the motive behind passage of both statutes was irrelevant, suggesting that the effect of both statutes was protectionist. *Id.* at 1197-98. The court added that, although motive was irrelevant, "the legislative intent behind § 659.141(1), if not § 660.10,

was not discussed by and apparently did not affect the decision of the Federal Reserve Board.

[4] The court initially abstained from construing the two Florida laws, pending interpretation of them by Florida courts, but the United States Court of Appeals for the Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950 (5th Cir. 1977).

The court originally declared the entire first sentence of section 659.141(1) unconstitutional. However, by an order dated March 22, 1979, the court amended the original order limiting its declaration to that portion of the sentence dealing with investment advisory services. The court's final holding thus did not address the constitutionality of that portion of section 659.141(1) which governs acquisition of Florida banks by out-of-state banks or holding companies.

was to discriminate against interstate commerce." *Id.* at 1198.

After holding both statutes unconstitutional, the court then found that federal law did not authorize Florida to enact the otherwise unconstitutional statutes. Specifically, the court held that section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), only allowed states to continue regulating bank holding companies within the pre-existing scope of their constitutional authority and did not permit states to extend that authority. 461 F. Supp. at 1199. The court also held that section 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), applied only to state laws governing holding company acquisitions of banks and did not cover laws governing acquisition of trust services or investment advisory services. *Id.*

ARGUMENT

THE QUESTIONS ARE SUBSTANTIAL[5]

The decision below raises an important question in the area of Federal-State relations with respect to

[5] The jurisdiction of this Court over the appeal seems clear, since the district court granted an injunction on constitutional grounds against the enforcement of one provision of the statute, and denied an injunction against the enforcement of the other provision.

The court stated explicitly in its opinion (461 F. Supp. at 1196) that "this parochial legislation must be deemed *per se* unconstitutional." And it entered an order declaring that both of the Florida statutes involved "are invalid as violative of the commerce clause and enjoining the further enforcement of § 659.141(1) against plaintiffs." 461 F. Supp. at 1201. The complaint in this case was filed on October 24, 1973, before the repeal of the three-judge court statute on August 12, 1976.

The question of this Court's jurisdiction is discussed further in the Jurisdictional Statement filed by the Appellant in this case.

banking. It strikes down, on constitutional grounds, state statutory provisions which undertook to exercise state power over a matter which has heretofore been considered as subject to state control, subject only to the overriding power of Congress. The decision is important not only with respect to the Florida statute directly involved, but also because of its effect on comparable provisions in the statutes of many other states. If allowed to stand, it will substantially disrupt the historic dual banking system of the United States wherein the banking industry is subject to state as well as national concerns and will tip the balance of regulation in favor of the unchecked aggregation of economic power which has characterized the economic systems of other countries but which has been considered undesirable in this country.

This is not the sort of issue which will be clarified by waiting for a conflict, nor is it one which will be helped by the process of maturing thought to be evidenced through a series of lower court decisions before this Court acts. On the contrary, it is a single clear-cut issue in the constitutional law of the commerce clause, on which this Court is expert. In the absence of a definitive decision of this Court, there can only be confusion and uncertainty in the administration of the many state laws involved, and waste of the time of state administrators, of lawyers for banks, and of the lower federal courts which will be called on to decide the cases which will inevitably arise until this Court speaks.

The following discussion is presented to show the intrinsic substantiality of the legal issues presented by the appeal from the decision below.

I

The Negative Implications of the Commerce Clause Do Not Invalidate Either of the Florida Statutes Held Unconstitutional by the Court Below.

Article I, Section 8, Clause 3 of the Constitution gives Congress "power . . . to regulate commerce . . . among the several states. . . ." This includes both a grant of power to Congress and negative implications which limit state interference with interstate commerce. *See* L. Tribe, American Constitutional Law § 6-2, at 320 (1978).

Two recent decisions of this Court are particularly applicable to statutes, such as those challenged in the instant case, which appear to discriminate against out-of-state business enterprises. *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978) and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). One decision struck down a state commercial regulation while the other upheld such a regulation. Both cases were decided within a week, and they can hardly be regarded as inconsistent. The Court found no federal preemption in either case; both cases rested purely on the negative implications of the commerce clause. Thus, the question here involves close consideration of these two cases and a determination of which one of them is most applicable to the issue here.

Philadelphia v. *New Jersey* tested the constitutionality of a New Jersey statute and attendant regulations which banned importation into New Jersey of nearly all forms of solid or liquid waste. 437 U.S. at 618-19. This Court characterized the New Jersey statute as a direct interference with the movement of goods, and held it invalid, since New Jersey had no

reason for distinguishing between waste generated out-of-state and waste generated in New Jersey. *Id.* at 629.

On its face, the statute at issue in *Exxon* did not discriminate against out-of-state enterprises. A Maryland law prohibited all producers and refiners of petroleum products from operating retail service stations in Maryland or from discriminating between customers in providing certain price discounts. 437 U.S. at 119-20. There are no producers or refiners of petroleum products in Maryland, however, so the burden of the state law fell entirely on the out-of-state refiners and producers, such as Exxon, that operated service stations in Maryland. This Court upheld the statute. The Court noted that the statute did not discriminate against all out-of-state firms since it only applied to producers and refiners, not to marketers such as Sears, Roebuck and Pantry Pride. *Id.* at 125-26, and n.15. The Court held the statute constitutional since it did not affect the shipment of petroleum products into Maryland, but only undertook to regulate retail distributions in Maryland. *Id.* at 127.

The statute at issue in *Philadelphia* regulated the interstate flow of an article of commerce—waste. "The case stands for the principle that a state may not prevent shipment of privately owned articles of trade in interstate commerce on the ground of local need or command." *Reeves, Inc.* v. *Kelley,* 586 F.2d 1230, 1232 n.3 (8th Cir. 1978), *vacated and remanded on other grounds,* No. 78-1194, May 14, 1979. By contrast, the statute in *Exxon* did not regulate the movement of articles of commerce, but rather limited control of in-state outlets for such articles.[6] The statute in *Exxon*

[6] *Exxon* is thus distinguishable from *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U.S. 333 (1977), a case cited

still had some effect on the interstate movement of articles of commerce, but the Court held that even if the Maryland law caused interstate refiners to stop selling gasoline at retail stations in Maryland and even if it also led to the loss of certain "special services" which these refiners were supposedly providing, the burden on interstate commerce would still be permissible. 437 U.S. at 127.[7]

Taken together, *Philadelphia* and *Exxon* represent two points of a continuum of state commercial laws. At the *Philadelphia* pole are laws that discriminate against products from, or consumers in, other states for no reason other than origin. These laws are invalid regardless of the reason for their adoption. At the *Exxon* pole are laws that discriminate against some, but not all, out-of-state business enterprises by preventing them from controlling in-state facilities. These laws are constitutional. In between are laws that burden interstate commerce to a degree. These laws may or may not be constitutional, depending on a balanc-

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by the unsuccessful appellants in *Exxon* as well as the court below in the instant case. *See* Brief for Appellants at 10, 11-12, 13, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978); *BT Investment Managers, Inc.* v. *Lewis*, 461 F. Supp. 1187, 1198 (N.D. Fla. 1978). The state statute held unconstitutional in *Hunt*, which regulated the grading system used on containers of apples sold in North Carolina, burdened interstate sales of apples from Washington State and discriminated against them. 432 U.S. at 350. By contrast, the statute in *Exxon* placed no burden on the interstate flow of articles of commerce, but affected control of in-state facilities by out-of-state firms. Thus *Hunt* is closer on its facts to *Philadelphia* than to *Exxon*.

[7] The three-judge panel in *BT Investment* cited *Philadelphia* six times, but completely ignored the *Exxon* decision and did not cite it.

ing of the burden imposed and the benefit conferred in light of the availability of practical and less burdensome alternatives.

Florida Statutes section 660.10 prohibits the performance of certain fiduciary functions by all corporations except:

(1) bank and trust companies incorporated in Florida, and

(2) national banking associations located in Florida and possessing trust powers.

It is immediately obvious that section 660.10 is directed, not at the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. Furthermore, section 660.10 does not prevent all out-of-state ownership of a facility in Florida which provides trust services. BTNYC and all other holding companies may be barred from controlling a Florida bank with trust powers. But out-of-state individuals are free to organize and own a bank with trust powers in Florida. The Constitution does not guarantee particular structures of interstate ownership and control, and the principles of *Exxon* will be satisfied so long as some out-of-state control is possible.

Similarly, Florida Statutes section 659.141(1) does not affect the flow of investment advisory services in interstate commerce; it only limits, but does not exclude, out-of-state ownership of investment advisory services. Section 659.141(1) would not prevent a nonbanking out-of-state corporation from opening an investment advisory service in Florida. And a holding company organized in any state in the union may operate an investment advisory service in Florida un-

der section 659.141(1), so long as its operations are principally conducted in Florida. Furthermore, section 659.141(3) contains "grandfather" provisions which enable some holding companies whose principal operations are conducted outside of Florida to open investment advisory services in Florida. BTNYC and BTIM are thus placed in the identical position of the plaintiffs in *Exxon*. They cannot control investment advisory services in Florida, but other interstate firms can.

The court below, by relying on *Philadelphia* and ignoring *Exxon*, erroneously held that the two Florida banking laws violated the commerce clause. These two laws are not *per se* invalid. The court below should have applied the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[8] Under *Pike*, the court below should have begun its evaluation of each Florida statute by identifying:

(1) the local purpose served by the statute;

(2) the degree of burden placed on interstate commerce by the statute; and

(3) any practical alternatives which could provide the same local benefit with less burden on interstate commerce.

The court then should have upheld the statutes, unless in each instance the burden imposed was clearly excessive in relation to local benefits, given available alternatives. *Id.* Application of the *Pike* test confirms the constitutionality of both Florida statutes.

[8] Under *Philadelphia*, a statute which is not *per se* invalid should be analyzed using the *Pike* balancing test. 437 U.S. at 624.

Banking is a business peculiarly affected with a public interest, and it has long been recognized that a state may regulate banking to protect the public welfare in the exercise of its police power.[9] Furthermore, banks and holding companies are organized as corporations, and states have always had some power to restrict and regulate out-of-state corporations. *See Bank of Augusta* v. *Earle*, 13 Peters 519, 597 (1839). A state may have a legitimate purpose in discriminating against some, but not all, out-of-state firms in its banking regulation. *See Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288, 1294 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975). The Florida statutes here at issue also serve more specific state interests, and these tip the balance in favor of constitutionality.

Florida Statutes section 660.10 regulates the performance of certain fiduciary functions. At least with respect to trust functions, this statute governs an area traditionally regulated by the states. *See American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313, 320 (D.S.C. 1974); *In re Estate of Scott*, 418 Pa. 332, 211 A.2d 429, 431 (1965); 1 A. Scott, The Law of Trusts § 1.11, at 31 (3d ed. 1967). Similarly, Florida Statutes section 659.141(1), governing control of investment advisory services, regulates an area of traditional state interest. Professor Loss has

[9] *See Noble State Bank* v. *Haskell*, 219 U.S. 104, 113 (1911); *Old Stone Bank* v. *Michaelson*, 439 F. Supp. 252, 256 (D.R.I. 1977); *American Trust Co.* v. *South Carolina State Bd. of Bank Control*, 381 F. Supp. 313, 320 (D.S.C. 1974); *New Hampshire Bankers Ass'n* v. *Nelson*, 336 F. Supp. 1330, 1336 (D.N.H.), *aff'd on other grounds*, 460 F.2d 307 (1st Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806, 809 (1958), *appeal dismissed*, 359 U.S. 311 (1959).

reported that in 1961, 22 states regulated investment advisers; by 1969, the total had increased to 29. 1 L. Loss, Securities Regulation 47 (1961); 4 L. Loss, Securities Regulation 2219 (1969). *See also Marketlines, Inc.* v. *Chamberlain,* 63 Ill. App. 2d 274, 211 N.E.2d 399, 402 (1965).

Thus Florida had a substantial state interest in the areas regulated by both section 660.10 and section 659.141(1). As previously noted, these statutes place only a negligible burden on interstate commerce since they govern the control of outlets for articles of commerce and not the flow of articles themselves. Hence consideration of alternatives would be futile since the burden on interstate commerce is already negligible. Even under the *Pike* test, neither Florida statute violates the commerce clause.[10]

Thus, the court below erred in holding the Florida statutes *per se* invalid under the commerce clause.

II

Sections 3(d) and 7 of the Federal Bank Holding Company Act of 1956 Specifically Authorize States to Adopt Laws Similar to Those Struck Down by the Court Below.

Even if both Florida statutes impermissibly burden interstate commerce, they are still valid since Congress authorized the states to pass such laws. "Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 315 (1945). Yet, in spite of the fact that two separate sections of the 1956 Act authorized the states to regulate commerce in the manner of the two Florida statutes, the court below struck down the statutes. This action requires review by this Court since it in effect deprives Congress of its power to regulate commerce.

[10] A South Carolina statute which prohibits corporations organized in a state bordering South Carolina from acting as a testamentary trustee for a resident decedent was held valid under the commerce clause on grounds that it applied equally to state and national banks. *American Trust Co.* v. *South Carolina State Bd. of Bank Control,* 381 F. Supp. 313, 322-23 (D.S.C. 1974).

Courts have not demanded a high level of specificity in congressional authorizations to states to regulate interstate commerce. In *International Shoe,* for example, this Court held that Congress had authorized state regulation by this broad language:

> No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

Id. Similarly, in *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 429 (1946), the Court upheld the congressional approval for state regulation and taxation of interstate insurance companies, which was phrased in these general terms:

> . . . the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws

of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

Congress may, of course, define the limits of state authorization with great specificity, and when Congress does so, the state is not free to enact legislation transcending those limits. *See Parke, Davis & Co.* v. *Health Cross Stores, Inc.,* 364 F.2d 214, 216 (4th Cir. 1966). But Congress may also allow states a great deal of flexibility in their regulation of interstate commerce, as demonstrated in *International Shoe* and *Benjamin.*

Two provisions of the 1956 Act constitute congressional approval of statutes such as those here at issue. Section 3(d) prohibits the Federal Reserve Board from approving an application by a bank holding company to acquire "any additional bank" located outside the state in which the holding company conducts its principal operations, unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located," expressly and not impliedly. 12 U.S.C. § 1842(d) (1976). This section was added to the 1956 Act by an amendment sponsored by Senator Douglas. *See* 102 Cong. Rec. 6750-58, 6854-62 (1956). One commentator has argued that "the practical effect of the Douglas Amendment is to sanction state control of interstate commerce. Congress has virtually encouraged the states to discriminate against out-of-state bank holding companies. . . ." Note, *The Bank Holding Company Act of 1956,* 75 Banking L.J. 277,

284-85 (1958). Since Congress authorized states to discriminate against out-of-state holding companies the next question is how specifically it limited the authorization.

By its own terms, section 3(d) applies to state laws governing acquisitions of a "bank" by an out-of-state holding company. Florida Statutes section 659.141 governs acquisition of an investment advisory service, while section 660.10 governs acquisition of a service performing fiduciary functions.

The 1956 Act defined "bank" to mean "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 1956 Act, § 2(c), 12 U.S.C. § 1841(c) (1976). The present definition was adopted in section 101(c) of the Bank Holding Company Act Amendments of 1970, 84 Stat. 1760, 1762 (1970), which excluded from the definition of "bank" those institutions which were not actually engaged in "commercial banking." S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970).

The use of the term "commercial banking" in the Senate Committee Report is crucial. Prior to 1970, this Court had stated that the term "commercial banking" denoted a "cluster of products (various kinds of credit) and services (such as checking accounts and *trust administration . . .*)." *United States* v. *Philadelphia NationalBank,* 374 U.S. 321, 356 (1963) (emphasis added). In the same opinion, the Court noted that "[b]anking services include . . . trusteeship services [and] . . . investment advice." *Id.* at 326 n.5. In addition, the 1970 amendments directed the Board of Governors of the Federal Reserve System to identify the

activities which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765 (1970). The Board has, by formally adopted regulations, identified the performance of certain fiduciary functions, and the rendering of investment advice, as two closely-related activities. 12 C.F.R. § 225.4(a)(4), (5) (1978). Thus, even if, as the Senate Committee Report indicates, Congress defined "bank" to include only those organizations involved in "commercial banking," it intended the definition to encompass fiduciary and investment advisory services in the context of section 3(d).

Other courts have not construed section 3(d) as narrowly as did the court below. The D.C. Circuit, for example, has held that Congress intended section 3(d) "to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy." *Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288, 1297 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975). Section 3(d) was thus a congressional authorization to states to restrict control by out-of-state holding companies of any organization which the Federal Reserve Board determined to be engaged in activities so closely related to banking as to be a proper incident thereto, whether the organization was a "bank" in the narrow sense or not.

Even if section 3(d) did not authorize states to pass laws such as Florida Statutes sections 659.141 and 660.10, section 7 of the 1956 Act did authorize such laws. 12 U.S.C. § 1846 (1976). Section 7 reads:

> The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Section 7 did not merely announce a congressional intention not to preempt state laws. It was an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner. It has long been recognized that section 7 enables states to place much greater restrictions on holding companies than would otherwise apply under the 1956 Act.[11] The Federal Reserve Board must deny holding company applications that propose a transaction illegal under state law. *Whitney National Bank* v. *Bank of New Orleans and Trust Co.,* 379 U.S. 411, 419 (1965). The state restrictions on holding companies which have gained judicial approval clearly burden interstate commerce. For example, if a state prohibits the formation of bank holding companies altogether, using its powers under section 7, the normal course of interstate commerce will be affected. Yet such outright bans have been approved. *See, e.g., Commercial National Bank* v. *Board of Governors,* 451 F.2d 86, 89 (8th Cir. 1971).

Lesser bans, such as those in the Florida statutes on certain types of holding companies and services, should also fall within the terms of section 7. As previously noted, Congress can specify with great detail what burdens states may and may not place on inter-

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[11] *See Grandview Bank & Trust Co.* v. *Board of Governors,* 550 F.2d 415, 419-20 (8th Cir.), *cert. denied,* 434 U.S. 821 (1977); *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 153 N.E.2d 806, 810 (1958), *appeal dismissed,* 359 U.S. 311 (1950); *Trans-Nebraska Co.,* 49 Fed. Res. Bull. 633, 638 (1963); P. Heller, Handbook of Federal Bank Holding Company Law 45 (1976).

state commerce. But section 7 is not limited. In the Bank Holding Company Act of 1956, Congress set the lower limits of restrictions on holding companies and allowed states to set higher limits, up to and including outright bans.

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction over the direct appeal by the Comptroller of Florida.

Respectfully submitted,

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Counsel for the Conference of State Bank Supervisors

July, 1979

APPENDIX

The rationale of the decision of the court below could place a significant number of other state statutes in jeopardy, including:

1) Alaska Stat. §§ 06.05.235, 06.05.540(9)
2) Del. Code Ann. tit. 8, § 379 (1975)
3) Ill. Ann. Stat. ch. 32, § 157.102 (Smith-Hurd 1954)
4) Iowa Code § 524.1805 (1971)
5) Ky. Rev. Stat. Ann. § 287.030(2) (1978 cum. supp.)
6) Minn. Stat. Ann. §§ 303.04, 303.25 (West 1969)
7) Mo. Rev. Stat. §§ 362.435, 362.925 (1969)
8) N.C. Gen. Stat. § 55-132(b) (1975)
9) Or. Rev. Stat. § 715.025
10) Pa. Stat. Ann. tit. 7, § 106(b) (Purdon 1978-79 cum. supp.)
11) S.C. Code § 34-23-30 (1977)
12) Tex. Prob. Code Ann. tit. 17A, § 105A(c) (Vernon 1978-79 cum. supp.)
13) Va. Code § 6.1-5. (1973)
14) W. Va. Code § 44-5-3 (1978 cum. supp.)

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

Filed July 10, 1979
Probable Jurisdiction Noted October 1, 1979

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

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[Exhibits have been omitted in printing]

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Stipulation of Facts, filed May 11, 1978..... 22

Exhibits attached to Stipulation:

Exhibit A - Order of the Board of Governors of the Federal Reserve System, dated April 26, 1973..... 26

[Remaining exhibits have been omitted in printing]

The following opinions, decisions and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the blue printed Jurisdictional Statement:

Order of District Court for the Northern District of Florida, accompanying Opinion, entered December 15, 1978.....A1

Opinion of District Court for the Northern District of Florida, Tallahassee Division, dated December 15, 1978.....B1

Order of District Court for the Northern District of Florida, Tallahassee Division accompanying Opinion, entered March 22, 1979.....D1

Opinion-Order of District Court for the Northern District of Florida, on Reclarification and Reconsideration, dated March 22, 1979.....E1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 24, 1973 - Plaintiffs' Complaint filed in U.S. District Court for the Northern District of Florida, Tallahassee Division.

November 15, 1973 - Defendant's Motion to Dismiss.

November 30, 1973 - Order entered constituting three judge court.

December 3, 1973 - Order of Chief Judge John R. Brown, U.S. Court of Appeals, Fifth Circuit, reconstituting the three judge court naming the Honorable Paul H. Roney as U.S. Circuit Judge in place of Judge David W. Dyer.

January 1, 1974 - Florida Bankers Association filed Petition for Leave to appear as Amicus Curiae. Granted February 14, 1974.

March 15, 1974 - Defendant's Supplement to Motion to Dismiss.

July 29, 1974 - Opinion-Order dismissing Complaint on the basis of "abstention" doctrine.

September 26, 1974 - Plaintiffs filed Notice of Appeal to the United States Supreme Court.

May 16, 1975 - United States Supreme Court denies jurisdiction, vacates District Court's Order, and remands so that fresh order may be entered from which a timely appeal may be taken to the U.S. Court of Appeals for the Fifth Circuit.

May 22, 1975 - Plaintiffs filed Motion for Designation of of Additional Judge.

November 17, 1975 - Order filed by Chief Judge John R. Brown, U.S. Court of Appeals, Fifth Circuit, reconstituting three judge court.

December 1, 1975 - Fresh Order entered dismissing cause without prejudice on "abstention" grounds, and substituting Gerald A. Lewis as party defendant.

December 30, 1975 - Notice of Appeal to U.S. Court of Appeals, Fifth Circuit, filed by plaintiffs.

October 17, 1977 - Received Judgment of U.S. Court of Appeals, Fifth Circuit, reversing and remanding cause to three judge court, issued as mandate on October 13, 1977.

November 21, 1977 - Order directing defendant to answer complaint by December 12, 1977.

December 12, 1977 - Defendant's Answer filed.

May 11, 1978 - Stipulation of facts filed by parties' attorneys.

September 1, 1978 - Three judge final hearing held.

December 15, 1978 - Final Order and Opinion, declaring Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141(1) (1977), unconstitutional. Defendant enjoined from enforcing provisions of § 659.141 (1).

December 26, 1978 - Defendant filed Motion for Clarification, Reconsideration and to Alter and Amend Judgment.

March 22, 1979 - Order granting in part, defendant's Motion for Clarification and Order altered in part. Motion denied in all other respects.

April 20, 1979 - Defendant filed protective Notice of Appeal to U.S. Court of Appeals, Fifth Circuit.

April 27, 1979 - Defendant filed Motion for Order Suspending Injunction and Staying Declaratory Judgment During Pending of Appeal.

May 11, 1979 - Defendant filed Notice of Appeal to United States Supreme Court.

June 4, 1979 - Defendant filed with Court of Appeals, Motion to Stay Further Proceedings in Appeal, pending any jurisdictional question in the U.S. Supreme Court. Granted by Clerk of Fifth Circuit. (motion unopposed)

June 19, 1979 - Order of District Court denying Motion for Order Suspending Injunction and Staying Declaratory Judgment During Pending of Appeal.

October 5, 1979 - Filed certified copy of U.S. Supreme Court noting probable jurisdiction.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
Civil No. 73-184

BT INVESTMENT MANAGERS, INC., and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs.

FRED O. DICKINSON, JR., Comptroller of
the State of Florida and Commissioner of
Banking of the State of Florida,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
Filed October 24, 1973

Plaintiffs, by and through their attorneys, bring this action against defendant and allege:

COUNT I

1. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201, seeking to declare unconstitutional a portion of subsection (1) of §659.141 of Chapter 659 of the Florida Statutes and for permanent injunction restraining the enforcement, operation and execution of the challenged statute and of any rules, regulations, interpreta-

tions or directives which have been or may be promulgated thereunder. [Section 659.141 of the Florida Statutes, a portion of subsection (1) of which is challenged by plaintiffs as unconstitutional, is attached hereto as Appendix A and is referred to herein as the "challenged statute".] Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, and 1343(3), and a hearing before a Three Judge Court is prayed for pursuant to provisions of 28 U.S.C. § 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. Plaintiff BT Investment Managers, Inc., is a corporation organized under the laws of the State of Delaware, with total authorized capital stock of $1,000.00, consisting of 1,000 shares of common stock with a par value each of $1.00. On November 27, 1972, BT Investment Managers, Inc., qualified under the laws of the State of Florida to do business in Florida. The offices of BT Investment Managers, Inc., will be located in Palm Beach, Florida. The Certificate of Incorporation of BT Investment Managers, Inc., was filed on November 24, 1972.

3. Plaintiff Bankers Trust New York Corporation is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. §1841, *et seq.* Bankers Trust New York Corporation, acting through several of its officers and agents, assisted in the organization of BT Investment Managers, Inc., as a body corporate under the laws of the State of Delaware.

4. The defendant Fred O. Dickinson, Jr., is the Comptroller of the State of Florida, ex officio Commissioner of Banking of the State of Florida, and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over state-chartered banks

and trust companies.

5. Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. §1843(c)(8), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System, to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board of Governors of the Federal Reserve System has provided by regulation that "[a]cting as investment or financial advisor" is an activity "so closely related to banking or managing or controlling banks as to be a proper incident thereto". 12 C.F.R. § 225.4(a)(5).

6. Section 659.141(1) of the Florida Statutes, prior to December 21, 1972, generally prohibited any "bank, trust company, or holding company, the operations of which are principally conducted outside [Florida]", from acquiring or retaining all or substantially all of the assets of, or control over, "any business organization having a place of business in [Florida] where or from which it furnishes investment advisory services to trust companies or banks in [Florida]". By virtue of an amendment which became effective on December 21, 1972, the prohibition was extended to the furnishing of investment advisory services to any person rather than, as theretofore, only to Florida trust companies and banks. This amendment to Section 659.141(1) disqualifies any business organization having a place of business in the State of Florida from furnishing investment advisory services in Florida at or from such place of business if such business organization is owned or controlled by a bank, trust company or bank holding company the operations of which are principally conducted in another State.

7. On October 3, 1972, Bankers Trust New York

Corporation applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through its subsidiary BT Investment Managers, Inc., in the following activity from an office of BT Investment Managers, Inc., located in Palm Beach, Florida: The activity of acting as an investment and financial advisor to the extent of providing portfolio investment advice to any person other than a Florida bank or trust company and furnishing general economic information and advice, general economic statistical forecasting services and industry studies.

8. On April 26, 1973, the Board of Governors of the Federal Reserve System issued an Order relating to the application of Bankers Trust New York Corporation referred to in paragraph 7 denying the proposal to act as an investment advisor. The Order states that:

> "Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal.***However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida.***
>
> "In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it. In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.***
>
> "***BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal." (Footnotes omitted)

A copy of this Order is attached as Appendix B hereto.

9. But for the protest by defendant and representatives of the Florida Bankers Association, the application of Bankers Trust New York Corporation referred to in paragraph 7, would have been granted and BT Investment Managers, Inc., would have been authorized by operation of law to engage in the investment advisory business in Palm Beach, Florida, prior to the effective date of the challenged statute.

10. BT Investment Managers, Inc., is amenable to process issued by the Courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida.

11. The challenged statute is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting an investment advisory business in Florida from competition by BT Investment Managers, Inc., by preventing BT Investment Managers, Inc., from marketing investment advisory services in Florida.

12. The challenged statute unlawfully discriminates against BT Investment Managers, Inc., and Bankers Trust New York Corporation and deprives BT Investment Managers, Inc., and Bankers Trust New York Corporation of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

13. The challenged statute unlawfully discriminates against BT Investment Managers, Inc., and denies to BT Investment Managers, Inc., the equal protection of the laws of the State of Florida, in contravention of the Fourteenth Amendment to the Constitution of the United States.

14. The challenged statute unlawfully suppresses commercial intercourse between Bankers Trust New York Corporation and BT Investment Managers, Inc., in prohibiting Bankers Trust New York Corporation from establishing, owning, directing and lending its expertise in investment advisory operations to BT Investment Managers, Inc., in contravention of the Commerce Clause (Article I, Section 8) and the Supremacy Clause (Article VI) of the Constitution of the United States.

15. The enforcement, or threatened enforcement by defendants of the challenged statute has caused injury, financial loss, loss of potential profits and loss of opportunity for corporate gain to BT Investment Managers, Inc., and Bankers Trust New York Corporation. Unless restrained by action of this Court, the enforcement or threatened enforcement by defendant of the challenged statute will cause injury, financial loss, loss of potential profits and loss of opportunity for corporate gain, to BT Investment Managers, Inc., and to Bankers Trust New York Corporation, who will be deprived of federally guaranteed rights for an indefinite period of time. Plaintiffs have no adequate or effective remedy other than the relief sought herein.

COUNT II

16. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201, seeking to declare unconstitutional and Section 660.10 of Chapter 660 of the Florida Statutes and a portion of subsection (1) of § 659.141 of Chapter 659 of the Florida Statutes and for permanent injunction restraining the enforcement, operation and execution of the challenged statutes and of any rules, regulations, interpretations or directives which have been or may be promulgated thereunder. [Section 660.10 of the Florida Statutes and Section 659.141 of the Florida Statutes, a portion of subsection (1) of which is challenged by plaintiffs as unconstitutional, are attached hereto as Appendix A and are referred to herein as the "challenged statutes"]. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, and 1343(3), and a hearing before a Three Judge Court is prayed for pursuant to the provisions of 28 U.S.C. § 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

17. Plaintiff Bankers Trust New York Corportion is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.* Bankers Trust New York Corporation, acting through several of its officers and agents, assisted in the organization of BT Investment Managers, Inc., as a body corporate under the laws of the State of Delaware.

18. The defendant Fred O. Dickinson, Jr., is the Comptroller of the State of Florida, ex officio Commissioner of Banking of the State of Florida, and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over state-chartered banks and trust companies.

19. Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System, to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board of Governors of the Federal Reserve System has provided by regulation that "performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), in the manner authorized by State law so long as the institution does not both accept demand deposits and make commercial loans" is an activity "so closely related to banking or managing or controlling banks as to be a proper incident thereto". 12 C.F.R. § 225.4(a)(4).

20. Section 659.141(1) of the Florida Statutes generally prohibits any "bank, trust company, or holding company, the operations of which are principally conducted outside [Florida]", from acquiring or retaining, directly or indirectly, all or substantially all of the assets of, or control over, "any trust company having a place of business in [Florida] where trust business or functions are performed". Section 659.141(1) disqualifies any trust company having a place of business in the State of Florida from performing trust business or functions in Florida at such place of business if such business organization is owned or controlled by a bank, trust company or bank holding company the operations of which are principally conducted in another State.

21. But for the existence of the challenged statutes, Bankers Trust New York Corporation would apply to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through a subsidiary trust company

having a national bank charter or a Florida state charter, in the activity of performing or carrying on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would organize such a trust company under the laws of the United States or the State of Florida. So long as the challenged statute remains in effect, it would be futile for Bankers Trust New York Corporation to make such application to the Board of Governors of the Federal Reserve System or to take any steps to organize such a trust company since the challenged statute precludes the Board of Governors of the Federal Reserve System from approving such an application and the banking authorities from authorizing the organization of such a trust company.

22. Bankers Trust New York Corporation is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida.

23. The challenged statute is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting a trust business in Florida from competition by trust companies owned by out-of-state holding companies, by preventing trust company subsidiaries of holding companies like Bankers Trust New York Corporation, from marketing trust company services in Florida.

24. The challenged statute unlawfully discriminates against Bankers Trust New York Corporation and deprives Bankers Trust New York Corporation of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

25. The challenged statute unlawfully discriminates against Bankers Trust New York Corporation, and denies Bankers Trust New York Corporation, the equal protection of the laws of the State of Florida, in contravention of the Fourteenth Amendment to the Constitution of the United States.

26. The challenged statute unlawfully suppresses commercial intercourse between Bankers Trust New York Corporation and the trust company it proposes to organize, in prohibiting Bankers Trust New York Corporation from establishing, owning, directing and lending its expertise in trust operations to such a trust company, in contravention of the Commerce Clause (Article I, Section 8) and the Supremacy Clause (Article VI) of the Constitution of the United States.

27. The enforcement, or threatened enforcement by defendant of the challenged statute has caused injury, financial loss, loss of potential profits and loss of opportunity for corporate gain to Bankers Trust New York Corporation. Unless restrained by action of this Court, the enforcement or threatened enforcement by defendant of the challenged statute will cause injury, financial loss, loss of potential profits and loss of opportunity for corporate gain, to Bankers Trust New York Corporation, who will be deprived of federally guaranteed rights for an indefinite period of time. Plaintiffs have no adequate or effective remedy other than the relief sought herein.

WHEREFORE, Plaintiffs pray as follows:

(1) That this Court convene a Three Judge Court pursuant to , U.S.C. § 2281, *et seq.*, to consider the validity under the Constitution of the United States of the challenged statutes;

(2) For judgment declaring that the challenged statutes on their face, and as applied to Plaintiffs, are invalid and unconstitutional in violation of Articles I, VI and the Fourteenth Amendment to the Constitution of the United States;

(3) For judgment permanently enjoining defendant and his agents, employees and representatives, from enforcing, seeking to enforce, or in any way relying upon the challenged statutes or any rules, regulations, interpretations or directives promulgated thereunder;

(4) For judgment granting such other and further relief as may seem just and proper to the Court.

Respectfully submitted,

MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
TCA 73-184

B. T. INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs.

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Defendant.

DEFENDANT'S ANSWER
Filed December 12, 1977

Defendant, GERALD A. LEWIS, as Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, by and through his undersigned attorneys, for its answer to the complaint herein, pleads as follows:

COUNT I

1. Defendant is without knowledge of the allegations contained in Paragraph one (1) of the complaint.

2. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph two (2) of the complaint.

3. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph three (3) of the complaint, as to Plain-

tiff's assistance in the organization of B. T. INVESTMENT MANAGERS, INC. Defendant ADMITS that Plaintiff Bankers Trust may be a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. §1841, *et seq.*

4. Defendant ADMITS the allegations of Paragraph four (4) of the complaint, noting that Gerald A. Lewis succeeded to the office of the Comptroller and has been substituted as a party defendant in the above-styled cause.

5. As to allegations of Paragraph five (5) of the complaint, Defendant ADMITS the existence of Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), as amended December 31, 1970, P.L. 91-607, Title I, § 103 (1-7), 84 Stat. 1764-1765. Defendant ADMITS the existence of 12 C.F.R. § 225.4(a)(5). Defendant states that the above speak for themselves.

6. Defendant ADMITS the allegations of the first two sentences of Paragraph six (6) of the complaint. Defendant is WITHOUT KNOWLEDGE as to the third sentence as it is a legal conclusion. Defendant would state that Section 659.141(1) speaks for itself.

7. Defendant ADMITS the allegations of Paragraph seven (7) of the complaint.

8. Defendant ADMITS the allegations of Paragraph eight (8) of the complaint.

9. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph nine (9) of the complaint.

10. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph ten (10) of the complaint.

11. Defendant DENIES the allegations of Paragraph

eleven (11) of the complaint.

12. Defendant DENIES the allegations of Paragraph twelve (12) of the complaint.

13. Defendant DENIES the allegations of Paragraph thirteen (13) of the complaint.

14. Defendant DENIES the allegations of Paragraph fourteen (14) of the complaint.

15. Defendant DENIES the allegations of Paragraph fifteen (15) of the complaint.

COUNT II

16. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph sixteen (16) of the complaint.

17. As to the allegations in Paragraph seventeen (17) of the complaint, Defendant realleges his answer in Paragraph three (3) above.

18. Defendant ADMITS the allegations of Paragraph eighteen (18) of the complaint, noting that GERALD A. LEWIS succeeded to the office of the Comptroller and has been substituted as a party defendant in the above styled cause.

19. As to the allegations in Paragraph nineteen (19) of the complaint, Defendant realleges his answer in Paragraph five (5) as it relates to 12 U.S.C. § 1843(c)(8). Defendant further ADMITS the existence of 12 C.F.R. § 225.4(a)(4), and states that it speaks for itself.

20. As to the allegations in Paragraph twenty (20) of the complaint, Defendant realleges his answer in Paragraph six (6) above.

21. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph twenty-one (21) of the complaint.

22. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph twenty-two (22) of the complaint.

23. Defendant DENIES the allegations in Paragraph twenty-three (23) of the complaint.

24. Defendant DENIES the allegations in Paragraph twenty-four (24) of the complaint.

25. Defendant DENIES the allegations in Paragraph twenty-five (25) of the complaint.

26. Defendant DENIES the allegations in Paragraph twenty-six (26) of the complaint.

27. Defendant DENIES the allegations in Paragraph twenty-seven (27) of the complaint.

Respectfully submitted,

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Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
TCA 78-184

STIPULATION

Filed May 11, 1978
[Caption Omitted in Printing]

Come now the parties, by and through their undersigned attorneys, and stipulate and agree for the purposes of this litigation as follows:

1. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201 seeking to declare unconstitutional a portion of Subsection (1) of Section 659.141 of Chapter 659 of the Florida Statutes and Section 660.10 of Chapter 660 of the Florida Statutes, and for permanent injunction restraining the enforcement, operation and execution of the challenged statutes and any rules, regulations, interpretations or directives which have been or may be promulgated thereunder. Jurisdiction is conferred on this Court by 28 U.S.C. § s 1331 and 1343(3), and the empanelment of a three-judge Court to resolve this cause is authorized by 28 U.S.C. §s 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. Plaintiff, BT INVESTMENT MANAGERS, INC., is a corporation organized under the laws of the State of Delaware, wholly owned by Plaintiff, BANKERS TRUST NEW YORK CORPORATION, with total authorized capital stock of $1,000.00, consisting of 1,000 shares of common stock with a par value each of $1.00. On November 27, 1972, BT INVESTMENT MANAGERS, INC., qualified under the laws of the State of Florida to do business in Florida. The offices of BT INVESTMENT MANAGERS, INC., not currently

located in Florida, will be located in Palm Beach, Florida. The Certificate of Incorporation of BT INVESTMENT MANAGERS, INC. was filed November 24, 1972.

3. Plaintiff, BANKERS TRUST NEW YORK CORPORATION, is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.* BANKERS TRUST NEW YORK CORPORATION, acting through several of its officers and agents, assisted in the organization of BT INVESTMENT MANAGERS, INC. as a body corporate under the laws of the State of Delaware.

4. During the pendency of the application of Plaintiff, BANKERS TRUST NEW YORK CORPORATION, identified in paragraph 7 of the Complaint herein, Defendant and representatives of the Florida Bankers' Association filed with the Board of Governors of the Federal Reserve System objections to said application citing prohibitions of Florida Statutes, § 659.141(1), as amended December 21, 1972.

5. Attached hereto as Exhibit "A" is a true and correct copy of the Order of the Board of Governors of the Federal Reserve System, dated April 26, 1973, denying the application of Plaintiff, BANKERS TRUST NEW YORK CORPORATION, referred to in paragraph 7 of the Complaint filed herein.

6. But for the existence of the challenged statutes, BANKERS TRUST NEW YORK CORPORATION would have applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through a subsidiary trust company having a national bank charter or a Florida state charter, in the activity of performing or carrying

on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.

7. BT INVESTMENT MANAGERS, INC. is amenable to process issued by the courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida.

8. BANKERS TRUST NEW YORK CORPORATION is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida.

9. The enforcement, or threatened enforcement by Defendant of the challenged statutes, and each of them, has caused injury, loss of potential profits and loss of opportunity for corporate gain to BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION. Unless restrained by action of this Court, the enforcement or threatened enforcement by Defendant of the challenged statutes will cause injury, loss of potential profits and loss of opportunity for corporate gain, to BT INVESTMENT MANAGERS, INC. and to BANKERS TRUST NEW YORK CORPORATION.

10. Attached hereto as Exhibit "B" is a true and correct copy of § 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. §1843(c)(8).

11. Attached hereto as Exhibit "C" is a true and correct

copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(a)(4).

12. Attached hereto as Exhibit "D" is a true and correct copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(a)(5).

13. Attached hereto as Exhibit "E" is a true and correct copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(b)(1).

14. Attached hereto as Exhibit "F" is a true and correct copy of § 659.141(1) of Chapter 659 of the Florida Statutes as it existed prior to December 21, 1972.

15. Attached hereto as Exhibit "G" is a true and correct copy of § 659.141(1) of Chapter 659 of the Florida Statutes as amended December 21, 1972.

16. Attached hereto as Exhibit "H" is a true and correct copy of § 660.10 of Chapter 660 of the Florida Statutes.

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[Certificate of Service Omitted in Printing]

FEDERAL RESERVE SYSTEM
BANKERS TRUST NEW YORK CORPORATION
Order Denying Proposal to Act as an Investment Adviser

Bankers Trust New York Corporation, New York, New York ("BTNYC"), a bank holding company within the meaning of the Bank Holding Company Act, has proposed under § 4(c)(8) of the Act and § 225.4(b)(1) of the Board's Regulation Y, to engage indirectly *de novo* in the performance of certain investment advisory activities, through B T Investment Managers, Inc., Palm Beach, Florida ("BTIM"), a wholly-owned subsidiary of BTNYC.

Notice of the proposal, affording opportunity for interested persons to express or submit comments and views on the proposal, has been published (September 25, 1972, *The Wall Street Journal* and September 26, 1972, West Palm Beach *Commercial Record*) in accordance with § 225.4(b)(1) of the Board's Regulation Y. The time for filing comments and views has expired, and all those received, including those of the Comptroller of Florida, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc., have been considered in light of the factors set forth in § 4(c)(8) of the Act (12 U.S.C. 1843(c)(8)). Among those letters commenting on the proposal were requests for a hearing; those persons seeking a hearing were asked what substantial issues of material fact, if any, were presented by the instant proposal and why any issues raised could not be resolved by the submission of written comments. Prior to receipt of responses to these questions, the Board was apprised that, on November 30, 1972, the Florida Legislature enacted legislation[1] that became effective on December 21,

EXHIBIT "A"

[1] The legislation amended section 659.141 of the *Florida Statutes*. Section 659.141, as amended, provides, in pertinent part:

1972. Subsequently, the Board entertained briefs and written argument on the issue of the applicability and effect of the amended statute on the instant proposal from those persons that had requested to be heard.

Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest,[2] it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have pro-competitive effects, and consequently should be viewed more favorably than the commencement of an activi-

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Footnote 1 cont'd.

659.141(1) Control; ownership. --
(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking, or trust business or functions are conducted, or acquire, retain or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all or substantially all the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding two years from the effective date of

ty through the acquisition of an existing concern"[3] and "where a bank holding company enters a new market *de novo* . . ., its desire to succeed in its new endeavor is more likely to be competitive".[4] However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. The legislation further provides however that the restrictions and prohibitions contained therein shall not be enforced for a period of time ranging up to five years against any holding company which, prior to the effective date of such legislation, acquired control over a business organization to which the restrictions or prohibitions of the statute apply.

Footnote 1 cont'd.

this act or from the date it becomes disqualified hereunder, whichever is later, unless said period of two years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of two years from time to time if the department determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed one year and all thereof shall not in the aggregate exceed three years.

• • •

(2) . . .

(c) A business organization provides investment advisory services if, in this state for compensation, it engages in the business of advising persons, as defined in § 1.01(3), Florida Statutes, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisability of investment in or purchasing securities, or if, not being a certified public accountant, in this state and for compensation, it issues or distributes to persons, as defined in § 1.01(3), Florida Statutes, analyses or reports concerning securities.

There appears to be tacit agreement that the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. However, BTNYC has contended that, under the "grandfather" provision in the statute, BTIM may open for business and engage in the provision of investment advisory services for a period of approximately two years. The protestants to the proposal, with the concurrence of the Comptroller of Florida, have contended that the "grandfather" benefit, conferred by the newly-enacted legislation, is not available to BTNYC or BTIM. However, assuming, without deciding, that the construction given the "grandfather" provision by BTNYC is correct, the Board perceives, as a possible adverse effect of the instant proposal, the indefinite and temporary nature of BTIM's performance of investment advisory services. The public is ill-served by a firm offering investment advisory services that may, by law, have to be terminated within a relatively short time period. Customers entering into contracts for such services would generally do so in reliance upon the continuing and long-term nature of such services. In another sense, one may question the vigor with which an entrant into a market will compete and the quality of the services it will offer, if its employees are burdened by the realization that, irrespective of their performance, their duty is only tempo-

[2]See the Board's Order of March 6, 1973, denying the application of First at Orlando Corporation to acquire shares of Citrus First National Bank of Leesburg, 38 *Federal Register* 6317 (March 8, 1973) and the Board's Statement accompanying its Order of March 9, 1973 approving, to the extent permitted by State law, the proposal of NCNB Corporation to engage in certain trust activities in South Carolina through American Trust Company, 1973 *Federal Reserve Bulletin* 305.

[3]*S. Rep.* No. 91-1084, 91st Cong., 2d Sess. 16 (1970).

[4]*H. R. Rep.* No. 91-1747, 91st Cong., 2d Sess. 17 (1970).

rary and the office may be closed at any time. However, in view of the disposition of the instant proposal on other grounds, the Board is not required to decide at this time whether the possibility of such an adverse effect is of sufficient weight as to outweigh the public benefits that may reasonably be expected to derive from the instant proposal, notably the increased competition probably resulting from *de novo* entry.

In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it.[5] In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.[6] The interpretation and construction of controverted State statutes is a task that is not eagerly undertaken by the Board. Certainly, the courts of Florida are a more appropriate forum for the resolution of disputed questions of Florida law, than is the Board. Nevertheless, the Board believes that the principle laid down by the Supreme Court in the *Whitney* case requires the Board to initially resolve the legal issue presented here.

The issue which is determinative of the instant proposal is whether the "grandfather" provision of the recently-enacted legislation effectively permits BTNYC to initiate

[5]*Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

[6]See Statement accompanying the Board's Order of March 9, 1973, approving, to the extent permitted by State law, the proposal of NCNB Corporation, Charlotte, North Carolina, to operate a trust company in South Carolina through American Trust Company, 1973 *Federal Reserve Bulletin* 305.

investment advisory services from a Florida office, albeit for an indefinite and temporary period of time. BTNYC states, and, in the absence of any evidence to the contrary, the Board finds that BTIM was incorporated in the State of Delaware on November 24, 1972, at the direction of BTNYC, and that, on November 27, 1972, BTIM qualified with the Secretary of State of Florida to do business in Florida. However, BTNYC has not alleged that BTIM, at any time, has had a place of business in Florida or that BTIM has furnished investment advisory services in Florida. Nor could BTIM legally have done so, the prior approval of the Board not having been secured by BTNYC. It is not contended that BTIM is either a bank or trust company.

On the basis of these facts, BTNYC contends, and the protestants do not contend otherwise, that BTIM is a "business organization"; that BTNYC has "control" over BTIM and had acquired that control prior to becoming disqualified under the newly-enacted legislation. The protestants, on the other hand, contend that, irrespective as to whether BTIM is a "business organization" or whether BTNYC controlled BTIM prior to the effective date of the amendment, BTNYC is not entitled to "grandfather" benefits because BTIM did not furnish investment advisory services in Florida from a place of business in Florida on the effective date of the legislation. In the Board's opinion, the conclusion is inescapable that the "grandfather" provision of the legislation only applies to a bank, trust company or business organization "having a place of business in [Florida] where or from which it furnishes investment advisory services in [Florida]" on the effective date of the legislation. Since BTIM is neither a bank or a trust company, and did not have on that date a place of business in Florida where or from which it furnished or provided investment advisory services, the Board concludes, as a matter of law, that BTNYC is not entitled to the benefits of the "grandfather" provision in section 659.141.

Furthermore, the legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. In view of the conflicting constructions given the "grandfather" provision, the Board believes that an examination of the legislative history of the legislation is appropriate to ascertain the legislative intent. It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Accordingly, the Board concludes that, the "grandfather" provision was not intended to permit the instant proposal, even for a limited period of time.

BTNYC, besides contending that the Board should refrain from construing the newly-enacted Florida legislation, contends that they are entitled to "grandfather" benefits because the "grandfather" provision, which authorizes the Florida Banking Department to determine the length of time during which the statute shall not be enforced against a company entitled to "grandfather" benefits, constitutes an unconstitutional delegation of authority to that agency. As the Board has previously indicated, it will presume the constitutional validity of State statutes. BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal.

The Board is not unsympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby proponents of this legislation could pre-

vent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." There is substantial evidence that the celerity with which the legislation was enacted is directly attributable to the pendency of the instant proposal before the Board. However, section 7[7] of the Act expressly reserves to the States the authority to adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and effect of any such legislation. Accordingly, irrespective of any doubt the Board may entertain as to the wisdom or desirability of a particular State enactment, the Board must, and will, respect, and act in the light of, pertinent State legislative judgments.

Based upon the record and for the reasons expressed herein, the proposal of BTNYC Corporation to provide investment advisory services in Florida through the instrumentality of BTIM, is hereby denied.

By order of the Board of Governors,[8] effective April 26, 1973.

CHESTER B. FELDBERG
Assistant Secretary of the Board

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[7] Section 7 of the Act provides

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (12 U.S.C. 1846)

[8] Voting for this action: Vice Chairman Robertson and Governors Daane, Brimmer, Sheehan, and Bucher. Absent and not voting: Chairman Burns and Governor Mitchell.

Supreme Court, U.S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

—vs—

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO AFFIRM AND BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

—*vs*—

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

MOTION TO AFFIRM AND BRIEF

MOTION TO AFFIRM

Appellees, B. T. Investment Managers, Inc. and Bankers Trust New York Corporation, pursuant to Rules 16 and 35 of the Rules of the Supreme Court of the United States, move the Court to affirm the judgment sought to be reviewed on appeal, on the ground that the questions on which the decision of the cause depends are so unsubstantial and well-settled as not to need further argument.

The facts upon which this motion is based are set forth in the Statement of the Case, appearing at pages 6 through 12, *infra*.

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Opinion Below

The opinion of the United States Three-Judge District Court for the Northern District of Florida dated November 15, 1978, is reported at 461 F. Supp. 1187 (N.D. Fla. 1978), and is set forth at Appendixes A-1 and B-1 of Appellant's Jurisdictional Statement. The Order of March 22, 1979, altering and amending the Order of December 15, 1978, is not reported, but is reprinted in Appendix D-1 to Appellant's Jurisdictional Statement.

Jurisdiction

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a three-judge court convened

pursuant to 28 U.S.C. § 2281 (1970).[1] That Order declares unconstitutional and enjoins the enforcement of a portion of Section 659.141(1), Florida Statutes (1977); and declares unconstitutional Section 660.10, Florida Statutes (1977). Both statutes were found to be violative of Article I, § 8, Cl.3 (the Commerce Clause) of the United States Constitution.

The Final Order was issued and Opinion entered on December 15, 1978, and was altered and amended, in part, on March 22, 1979. Notice of Appeal was filed May 11, 1979, in the United States District Court for the Northern District of Florida.

It is acknowledged that the Supreme Court of the United States is specifically given the *power* to hear this appeal by 28 U.S.C. § 1253 (1976), pertaining to appeals from decisions of three-judge courts. It is equally clear, however, that under both the Court's own Rules and prior decisions, this Court is not required to exercise that power, where the arguments raised on appeal are frivolous and so clearly disposed of by prior precedent as to require no further argument. Rule 16(1)(c), Rules of the Supreme Court of the United States, provides in pertinent part:

> "Rule 16. Motion to dismiss or affirm.
> 1. Within thirty days after receipt of the jurisdictional statement . . . the Appellee may file a printed . . . motion to affirm.
>
> * * *

1/ 28 U.S.C. § 2281 (1970) was repealed by Pub.L. 94-381. However, this repealer was expressly inapplicable to any action commenced on or before August 12, 1976. Thus, the repealer does not affect the statutory jurisdiction of the Court over this appeal.

> (c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

This Court earlier expressed the same principle in the case of *Enrique Del Pozo y Marcos v. Wilson Cypress Company*, 269 U.S. 82 (1925). There the Court noted that a motion to dismiss the appeal was not proper inasmuch as the appeal taken was admissible under then existing jurisdictional statutes; but nonetheless granted the alternative motion to affirm because the issues raised on appeal were clearly disposed of by prior precedent. The Court stated:

> "No question is presented which can be regarded as debatable in this court, so there is no need for holding the case for further argument." 269 U.S. at 90.

Similarly, in *Hodges v. Snyder*, 261 U.S. 600 (1923), the Court held that inasmuch as the trial court's construction and application of the due process clause were clearly in conformity with the recent pronouncements of this Court, the question raised on appeal did not require further argument, and the motion to affirm should be granted.

Again, in *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923), the Court denied a motion to dismiss a due process attack upon a state legislative act creating a tunnel improvement district, but granted a motion to affirm, stating that:

> "The motion to affirm the judgment should, however, be granted, if the questions on which the decision depends are found to be so wanting in substance as not to need further argument." 262 U.S. at 717.

The Court found that the judgment of the Supreme Court of California was "plainly right," and affirmed that judgment.[2]

As is further amplified below, the questions posed by this appeal and the arguments raised in the Jurisdictional Statement are so unsubstantial and so clearly foreclosed by prior decisions of this Court that no further argument is necessary, and the Motion to Affirm should be granted.

Constitutional Provision, Statutes, and Rules Involved

1. Article I, § 8, Cl.3 United States Constitution. Congress shall have power . . . to "regulate commerce . . . among the several states . . ."

2. Section 659.141(1), Florida Statutes (1972 Supp.). (The full text of the statute is set forth in appendix B-1 hereto).

3. Section 659.141(1), Florida Statutes (1977). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-1.)

2/ In more recent cases, the Court has seen fit to grant motions to affirm in memorandum opinions. *See, e.g., Sowervine v. United States*, 431 U.S. 961 (1977) (appeal from the decision of a three-judge District Court); *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972).

4. Section 660.10, Florida Statutes (1977). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-1.)

5. 12 U.S.C. § 1841(b) and (c) (1976). (The full text of the statute is set forth in appendix B-2 hereto.)

6. 12 U.S.C. § 1842 (1976). (The pertinent portion of the statute is set forth in appendix B-2 hereto.)

7. 12 U.S.C. § 1843(c)(8) (1976). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-5.)

8. 12 U.S.C. § 1846 (1976). (The full text of the statute is set forth in the Jurisdictional Statement, appendix C-7.)

9. 12 C.F.R. § 225.4(a)(4) and (5) (1978). (The full text of the regulations is set forth in the Jurisdictional Statement, appendix C-7.)

10. 12 C.F.R. § 225.4(b)(1) (1978). (The full text of the regulation is set forth in appendix B-3 hereto.)

Questions Presented

1. Whether the three-judge court below was correct in holding that § 660.10, Florida Statutes (1977), forbidding out-of-state companies from exercising certain fiduciary powers in Florida, and § 659.141(1), Florida Statutes (1977), prohibiting only those bank holding companies with a principal place of activity outside Florida from owning or controlling trust or investment advisory offices in Florida, discriminate against interstate commerce and are, therefore, invalid under the Commerce Clause of the United States Constitution.

2. Whether the three-judge court below was correct in holding that the provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1842(d) and 1846 (1976), did not authorize the Florida Legislature to discriminate against interstate commerce as that Legislature did by the passage of § 659.141(1), Florida Statutes (1977).

Statement of the Case

Appellee, BANKERS TRUST NEW YORK CORPORATION (hereinafter "Bankers Trust") is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq*. Appellee BT INVESTMENT MANAGERS, INC. (hereinafter "BT Investment") is a corporation organized and incorporated on November 24, 1972, under the laws of the State of Delaware, and is a wholly-owned subsidiary of Bankers Trust. BT Investment qualified under the laws of the State of Florida to do business in Florida on November 27, 1972.

Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8) (1976), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System (hereinafter "Board") to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board has provided by regulation that "[p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "acting as an investment or financial advisor" are such activities. 12 C.F.R. §§ 225.4(a)(4) and (5) (1978).

On October 3, 1972, Bankers Trust applied to the Board pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1) (1978), for authority to engage through its proposed subsidiary, BT Investment, from an office located in Palm Beach, Florida, in acting as an investment and financial adviser. At that time, the contemplated activity was not prohibited by Florida Statutes.

At the time of that application, § 659.141(1), Florida Statutes (1972 Supp.), generally prohibited any bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring or retaining all or substantially all of the assets of, or control over, any business organization having a place of business in Florida which furnishes investment advisory services *to trust companies or banks in Florida.* Objections were filed to Appellees' application by both the Comptroller of the State of Florida (Appellant herein) and the Florida Bankers Association (hereinafter "FBA") (amicus curiae below). Following the filing of these objections Appellant and FBA actively pursued a legislative course designed to protect the local business interests from which the membership of FBA is drawn.

While Appellees' application was pending, the Governor of the State of Florida called the Legislature into special session, in order to consider legislation concerning capital punishment and other subjects unrelated to this litigation.[3] Largely at the urging of Appellant and FBA, and in direct response to Appellees' pending

3/ The Proclamation of the Governor is contained at Vol.1, Laws of Florida, 1973, p.1, and sets forth the purview of the matters for which the special session was called by the Governor.

application,[4] the Legislature of the State of Florida hurriedly enacted an amendment to § 659.141(1), Florida Statutes (1972 Supp.)[5] extending its prohibition of the furnishing of investment advisory services so as to preclude Appellees from rendering such services to "any person" rather than, as theretofore, only to Florida trust companies and banks.

On April 26, 1973, the Board issued an order denying Appellees' proposal to act as an investment adviser. The Board's Order states in pertinent part:

> "Absent the recent enactment of amendments to Section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose

4/ In its Order Denying Proposal to Act as an Investment Adviser, the Board found:
"It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry." Federal Reserve Board Order of April 26, 1973, Fed.Res.Bull. 364, 366 (1973)

5/ House Bill 25-A was admitted for introduction in the Florida House of Representatives on November 29, 1972, Journal of the Florida House of Representatives, p.25 (November 29, 1972); was placed on the House Special Order Calendar on November 30 without having been heard or subjected to substantive analysis by any committee, Journal of the Florida House of Representatives, p.28 (November 30, 1972); and was passed by the House of Representatives and immediately certified to the Florida Senate that same day, Journal of the Florida House of Representatives, pp.29-30 (November 30, 1972). The Bill was taken up out of order and passed on the floor of the Florida Senate that same day, Journal of the Florida Senate, p.21 (November 30, 1972). It then became Chapter 72-726, Laws of Florida (1973), without the Governor's signature.

or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. * * * However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida." 59 Fed.Res.Bull. 364, 365 (1973).

Though the Board recognized the Florida Legislature's action as an attempt to prevent out-of-state competition,[6]

6/ Throughout its Order Denying Proposal to Act as an Investment Adviser, the Board reiterated its conclusion that the 1972 amendment to § 659.141(1) was intended to protect Florida interests from out-of-state competition in general and from Appellees in particular. At page 365 of its Order, the Board noted the congressional recognition that the de novo entry of bank holding companies into a new market would have procompetitive effects. The Board found, however, that the 1972 amendment was intended to preclude Bankers Trust from engaging in this competition. The Board stated:

"There appears to be tacit agreement that the recently -enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." *Id.* at 365.

The Board also noted that:

"[T]he legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in a Florida office." *Id.*at 366.

"Reviewing this order and the findings of the Board in their entirety, the Fifth Circuit Court of Appeals noted in *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.13 (5th Cir. 1977):

Reviewing the circumstances of the enactment of the amendment to *Fla. Stat.* § 659.141(1), the Federal Reserve Board minced no words in characterizing the Florida Legislature's action as a brazen attempt to prevent out-of-state competition."

it nonetheless held that, solely because of the amendment to the Act, it was required to disapprove the Appellees' application,[7] and that it did not have the judicial power requisite to passing on Appellees' contention that such an act was unconstitutional.[8]

On November 13, 1973, Banker's Trust petitioned the United States Court of Appeals for the Second Circuit for review of the Order of the Federal Reserve Board denying its proposal to act as an investment adviser. The petition has been withdrawn with leave of the court to reinstate at the option of petitioner pending the outcome of the instant litigation.

It was stipulated by the parties that but for the existence of the challenged statutes, Bankers Trust would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary, in the activity of performing or carrying on at a place of business in Florida one or more of the activities

7/ The Board stated:

"In brief, since the Board is of the opinion that the proposal is prohibited by State law it believes that, under the doctrine set forth by the U. S. Supreme Court in *Whitney*, it must deny the proposal." *Id.* at 366.

8/ The Board stated:

"The Board is not unsympathetic with BTNYC when that holding company questions the fairness and legality of a procedure whereby the proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." *Id.* at 366.

However, the Board had previously noted:

"BTNYC's challenge to the constitutionality of any provision of the recently - enacted Florida legislation is properly cognizable only by the judiciary." *Id.* at 366.

or functions that may be performed or carried on by a trust company in a manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.[9]

This action was commenced to secure a judicial declaration and injunction restraining enforcement of these statutes.

Shortly after commencement of the action, Appellant moved to dismiss based upon the "abstention" doctrine arguing, *inter alia*, that the federal court should abstain from ruling on the constitutionality of these statutes until their possible application to Appellees had been determined by the courts of Florida. Though this motion was granted by the three-judge court, the Fifth Circuit Court of Appeals noted that this contention was "in view of Appellee's role in blocking approval of Appellant's application . . . frankly speaking, incredible," and reversed and remanded so that the three-judge court could pass on the constitutionality of the statutes. *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954 n.13 (5th Cir. 1977). The court stated:

> "Indeed by their very terms the challenged statutes could scarcely be clearer in effect, if not in purpose — that is, to rid Florida banking and trust interests of non-Florida competition in the area of investment counseling." *Id.* at 954.

After extensive briefing and argument on the merits, the three-judge court held that § 660.10 and the first sentence of § 659.141(1) were patently discriminatory

9/ Stipulation filed May 11, 1978 at pp.2-3.

against out-of-state concerns and that the record conclusively indicated that the legislation was *per se* unconstitutional as contemplated by this court in the recent case of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In the instant case the three-judge court stated:

> "The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bankholding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia v. New Jersey, supra*, this parochial legislation must be deemed per se unconstitutional." 461 F. Supp. at 1196.

It is from this order that the Comptroller of the State of Florida has appealed.

Summary of Argument

Section 660.10, Florida Statutes (1977), prohibits certain otherwise similar banks and companies from performing certain trust and fiduciary duties based solely upon whether they are incorporated or located inside or outside the State of Florida. Similarly, § 659.141(1), Florida Statutes (1977), prohibits only those bank holding companies having a principal place of operation outside Florida from owning or controlling any organization which operates a trust company or an investment advisory service office in this state.

Inasmuch as these two statutes both on their face and patently discriminate based on out-of-state origin or principal place of business, they are *per se* violative of the Commerce Clause of the United States Constitution. The "balancing approach" which has in some cases saved legislation having a legitimate local purpose and only incidentally burdening interstate commerce cannot be invoked to save these statutes, because they are patently and facially discriminatory; these discriminatory features promote no legitimate local interest; and the burden imposed by the statutes is not incidental but effectively amounts to one of total prohibition.

The argument of Appellant — that § 659.141(1) was properly enacted pursuant to congressional authorization in the Bank Holding Company Act of 1956 to discriminate against interstate commerce in the acquisition of investment advisory service organizations in Florida — constitutes an admission that that statute was intended to be discriminatory, as argued above. That argument is further erroneous in that the portion of the Bank Holding Company Act relied upon by Appellant authorizes states to discriminate against interstate commerce *only* in the acquisition of *banks* and contains no such authorization to discriminate in the acquisition of companies other than banks, which acquisitions are a focus of § 659.141(1).

In spite of the numerous false issues suggested by Appellant in an attempt to render the clear unconstitutionality of the above statutes at least debatable in this Court, the questions on which the decision of the cause depends are so unsubstantial and well-settled as not to need further argument.

Argument

THE QUESTIONS RAISED BY THIS APPEAL ARE WELL SETTLED BY BOTH LONG-STANDING AND RECENT PRECEDENT, AND ARE SO UNSUBSTANTIAL AS TO RENDER FURTHER ARGUMENT UNNECESSARY

The correctness of the three-judge court's ruling is clearly settled and practically nondebatable in light of the clear realities that:

I. Sections 659.141(1) and 660.10, Florida Statutes (1977), both on their face and in effect, overtly discriminate against interstate commerce based solely upon factors of out-of-state origin, and are therefore *per se* unconstitutional;

II. The "balancing approach" of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is not reached, and if reached does not save these statutes; and,

III. The admitted discrimination of § 659.141(1) Florida Statutes (1977), against interstate commerce is clearly not authorized by the Bank Holding Company Act.

In the course of discussing the correctness of these three broad points Appellees will dispose of various false issues raised by Appellant and by Amicus Curiae, Conference of State Bank Supervisors (hereinafter "Bank Supervisors"), in futile attempt to render the clear correctness of the lower court's orders debatable in this Court. Simply because these false issues are numerous and at times

attenuated and complex, they should not be allowed to obfuscate or require further argument in this Court as to the obvious propriety of the above points and the three-judge court's holding.

I.

THE CHALLENGED STATUTES, BOTH ON THEIR FACE AND IN EFFECT, OVERTLY DISCRIMINATE AGAINST INTERSTATE COMMERCE BASED SOLELY UPON FACTORS OF OUT-OF-STATE ORIGIN, AND ARE THEREFORE *PER SE* UNCONSTITUTIONAL

This Court's recent decision in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), rendered shortly before the three-judge court's resolution of this matter on the merits, was the subject of separate briefs by each of the parties herein, and was analyzed in detail by that court. Though strikingly similar to the instant controversy in all material respects, that decision was certainly not novel, but was merely a recent re-expression and summary of the long-standing protection afforded to interstate commerce from local economic protectionism and discrimination.

Before scrutinizing in detail the statute to be examined in that case, the Court in *Philadelphia* reiterated the axiom that it is the aim of the Commerce Clause to preserve a truly national economy. Quoting from *H. P. Hood and Sons, Inc. v Du Mond*, 336 U.S. 525, 537-38 (1948), the Court in *Philadelphia* stated:

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting custom barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." 437 U.S. at 623.

Indeed the Court must presently go no further than a facial reading of the challenged statutes to discern their violation of these principles. If, for example, § 659.141(1) were enacted in all states of the nation, not only would Appellees be precluded from having trust and investment advisory services in Florida, but Appellees and all other bank holding companies would be similarly prohibited from offering these services through offices of subsidiaries in any other state save only the one where the majority of their services were offered. Every state would be discriminating against the bank holding companies of every other state. Thus, the restriction imposed by statute is directly antagonistic to the maintenance of a national economic unit, and clearly tends to promote isolationism.

At pages 623 through 624 of *Philadelphia*, the Court traced its historical vigilance to the evils of "economic isolation and protectionism" while at the same time recognizing that "incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people." The Court further noted at page 624 that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected," and found at page 624 that "the clearest example of such legislation is a law

that overtly blocks the flow of interstate commerce at a state's borders."

Application of these long-standing principles to the challenged statute is so clear as to foreclose further debate. Every impartial forum that has reviewed the challenged Florida Statutes, and which was familiar with the history of their enactment has concluded that they are a blatant form of overt economic isolationism.[10] Indeed, it is difficult to imagine how Appellant and Bank Supervisors can suggest to this Court that these statutes are not discriminatory, inasmuch as they later attempt to convince the Court that § 659.141(1), Florida Statutes (1973), was intended to be discriminatory pursuant to a (wrongly perceived) congressional authorization to burden interstate commerce.[11]

As noted by this Court in *Philadelphia* the crucial inquiry:

> ". . . must be directed to determining whether [the statute under scrutiny] is basically a protectionist

10/ In regard to the findings of the Board and the Fifth Circuit Court of Appeal, see n.6, *supra*. The three-judge court reached an identical conclusion at 461 F. Supp. at 1196, quoted herein at p.12, *supra*.

11/ At pages 9-13 of the Jurisdictional Statement, and 14-20 of Bank Supervisors' brief, Appellant and Bank Supervisors argue strenuously and at length that § 659.141(1) is constitutional because it was enacted pursuant to a congressional authorization to infringe on interstate commerce in an otherwise constitutional fashion. While the fallacies in that argument are dealt with in greater detail, *infra*, it must here be noted that such argument is a direct admission that this statute is in fact discriminatory, and renders any contrary assertion incredible.

> measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.* at 624.

Further, the Court stated that whatever the state's ultimate purpose,

> "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently." (Emphasis added). *Id.* at 626-27.

Just as the Court concluded in *Philadelphia*, *id.* at 628-29, both on their face and in plain effect the challenged statutes violate this principle of nondiscrimination.

In the present case, this discrimination based purely on origin fairly leaps from the face of the statutes. As to § 659.141(1), the statute does *not* purport to generally prohibit the providing of investment advisory or trust services, nor does it evenhandedly provide a common scheme of regulation or prohibition to the rendering of such services by bank holding companies or their subsidiaries. Instead, it blatantly provides that only those bank holding companies *whose operations are principally conducted outside of this state* are precluded from controlling business organizations having a place of business in this state from which they furnish investment advisory services in this state.

Neither that statute itself, nor any evidence in the record, nor the fertile imagination of counsel has suggested any reason (other than the impermissible one of

out-of-state origin) to discriminate between trust and investment advisory services rendered by subsidiaries under the control of a holding company whose principal activities are conducted outside Florida, and those rendered under the control of an identically structured company whose principal activities are conducted inside Florida.

Similarly, § 660.10 both on its face and in effect discriminates among otherwise identical entities based upon purely geographic factors, in determining whether those entities shall be prohibited from exercising the enumerated power and duties.

These statutes are blatantly and clearly discriminatory, and *per se* violations of the general and long-standing prohibitions summarized in *Philadelphia*.

A comparison of the facts in *Philadelphia* with the instant legislation introduces no doubt or debate as to the above conclusion. In *Philadelphia* the purported evil sought to be regulated by the state statute was the accumulation of waste. In the instant case, the only justification yet proposed for § 659.141(1) generally is that it is part of the state's attempt to preclude an accumulation and concentration of economic wealth and power in specified institutions, primarily holding companies.[12] Assuming arguendo that such an evil exists (as

12/ In the instant case, a review of the Jurisdictional Statement and the Brief of Bank Supervisors fails to suggest any specific evil that § 659.141(1) is designed to avoid. Thus, it is difficult to dispute whether such evil actually exists and whether or not § 659.141(1) is designed to avoid it. The closest Appellant or Bank Supervisors come to suggesting a specific evil is the general inference that this statute was enacted pursuant to a perceived congressional intent to minimize the concentration of economic power.

the Court was willing to assume in *Philadelphia*), the Court very properly held in *Philadelphia* that inasmuch as the economic unit was the Nation, it was impermissible for the statute to impose *only* on *out-of-state* interests the full burden of solving that problem. Similarly, in the instant case, if concentration of economic power in holding companies is the evil feared, then it is impermissible for Florida to cast the full burden of that problem upon out-of-state interests.[13] To be constitutional, (other issues aside) such regulation would have to apply evenhandedly to entities whose principal place of operation was inside the state as well as to those outside.

Appellant and Amicus Curiae attempt to divert the Court's attention from those discriminatory features which are repugnant to the Commerce Clause by focusing instead on other non-geographic discriminatory factors also contained within the statutes. In discussing § 660.10,

13/ Even if the existence of such a problem is assumed, it is clear that these statutes are not directed at solving it. The centralization and accumulation of economic influence is in no way precluded by these statutes but is merely reserved for the Florida bank holding conglomerate to the exclusion of non-Florida competitors. Likewise, the subject statutes do not attempt to regulate or control the activities dealt with (investment advisory services or trust activities). Rather, they attempt to differentiate based on the principal place of activity of the corporations that would be performing those activities, all of which corporations would admittedly be subject to state control and regulation. Again, the purpose of the statute is not to insure the state's ability to regulate, but rather to protect and isolate local interests from interstate competitors. Thus, both the purpose and the effect of the subject statutes are exactly opposite to solving the problem suggested by Appellant and Bank Supervisors. The statutes both in purpose and effect actually encourage and facilitate the concentration and accumulation of the financial oligopoly existing in Florida by insulating the oligopoly against the pro-competitive effect of Appellees' proposed *de novo* activities.

at page 13 of the Jurisdictional Statement, for example, Appellant emphasizes that certain prohibitions apply to "all corporations . . . except Florida corporate trust companies *with trust powers*. . . ." (Emphasis in original). By emphasizing application of the general prohibition to all corporations except those with trust powers, Appellant seeks to divert attention from the fact that among members of that limited class of state banks and trust companies which are authorized to possess trust powers, there exists the unconstitutional discrimination herein against those members which do not happen to be incorporated in Florida, and which may not be incorporated in Florida by virtue of § 659.141(1). Similarly, in discussing § 659.141(1) at pages 11-12 of its Brief, Bank Supervisors argues that the statute does not discriminate purely based on geography inasmuch as it "would not prevent a non-banking out-of-state corporation from opening an investment advisory service in Florida." This diversion again ignores the facial reality that among those business entities which are in all other material respects identical, the statute discriminates against some based upon purely in-state/out-of-state considerations. The fact that these considerations of origin are determined by principal place of activity as opposed to place of incorporation makes this geographic factor no less burdensome or discriminatory in impeding the flow of commerce into the state.

Another false issue suggested by Appellant and Bank Supervisors is the notion that holding these statutes unconstitutional would substantially undermine the dual system of banking regulation. They suggest that striking these statutes would in effect deprive the states of the right Congress has left to them to regulate participation in

the financial community within their borders,[14] and, would also impinge on the state's regulation of trust and fiduciary duties within their borders.[15] These arguments

14/ Throughout the Brief of Bank Supervisors and the Jurisdictional Statement (*see, e.g.*, Brief of Bank Supervisors at 7 and Jurisdictional Statement at 20) Appellant and Bank Supervisors express profuse concern for the effect of the three-judge court's opinion on the entire field of banking regulation in Florida. This broad brush paranoia is absurd in light of the legislative history of § 659.141(1), Florida Statutes. Appellant and Bank Supervisors fail to note that the broad and absolute prohibition of that present statute did not even exist as a part of Florida's banking regulations prior to its hurried enactment in direct response to Appellees' application. Since Florida had successfully regulated banking activities for many years prior to the 1972 amendment it is ludicrous to suggest that the entire regulatory scheme is dependent on that amendment.

15/ In its argument in support of the constitutionality of § 660.10, at pp.13-16 of the Jurisdictional Statement, Appellant bemoans that:

> "In holding § 660.10, Fla. Stat., unconstitutional, the lower court struck down a statute which had been the governing law of Florida for over 50 years, and which is similar to statutes enacted in other jurisdictions for similarly lengthy periods."

Similarly, Bank Supervisors in its appendix at p.21, lists several statutes from other states which it asserts would be jeopardized by the decision of the court below. The three-judge court properly disposed of this purported justification for the Florida statute.

> "A statute's longevity or commonplace nature, however, is an insufficient rationale for justifying its demonstrated discrimination against interstate commerce." 461 F. Supp. at 1201 n.12.

Conspicuously absent from the Jurisdictional Statement is any assertion whatsoever of a legitimate local concern or regulatory need that is promoted by that statute. Indeed, as set forth in great length in the Stipulation filed May 11, 1978, at pp.1-3, quoted herein at p.29, *infra*, it has been stipulated by the parties that Appellees are already subject to all reasonable regulations imposed by the State of Florida. Thus, simply because this unconstitutional statute has been on the books for a number of years, that longevity is irrelevant when no local regulatory need is facilitated by the discriminatory features of it.

incorrectly characterize Appellees' position and the effect of the three-judge court's order. Appellees have in no way contended, and that court did not order, that dual regulation must be abolished or that the states cannot reasonably regulate in the general areas addressed by §§ 659.141(1) and 660.10.[16] *Philadelphia v. New Jersey* clearly states and Appellees fully recognize that "in the absence of federal legislation, these subjects are open to control by the states so long as they act within the restraints imposed by the Commerce Clause itself." 437 U.S. at 623. In other words, the states remain completely free to regulate *in a nondiscriminatory fashion.*[17]

In further attempt to inject some debate as to the constitutionality of these patently discriminatory statutes, both the Appellant and Bank Supervisors have raised the

16/ The ability of the State of Florida to reasonably regulate the proposed activities of Appellees has never been an issue in this litigation. As set forth in greater detail at 29 *infra*, all parties have stipulated that in the conduct of their business in Florida Appellees would be subject to any and all regulatory requirements reasonably imposed by the State of Florida.

17/ The three-judge court fully recognized the right of the Florida Legislature to engage in reasonable regulation, as opposed to discriminatory prohibition. That court stated:

> "Florida unquestionably may act by legislation to control or prevent undue concentrations of economic power in the banking, investment, and trust businesses. In order not to run afoul of the Commerce Clause, though, this legislation must impact evenhandedly upon in-state and out-of-state firms alike. § 659.141(1) and § 660.10 place the full weight of the purported state concern for competition upon foreign companies, leaving unchecked any possible abuses by Florida corporations. Where, as here, there is no evidence beyond simple speculation that foreign companies pose any greater danger to competition than do Florida firms, the former may not be singled out for prohibition." 461 F. Supp. at 1197-98.

case of *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). In fact, a proper reading of that case further establishes the unconstitutionality of these statutes. This is so because the patent and facial discrimination obviously present in the instant statutes was specifically noted to be absent in the statute there scrutinized, and because the factors held essential to the saving of that statute are clearly not present here. Appellant is accurate in its summary, at page 19 of the Jurisdictional Statement, that:

> "In *Exxon, supra*, this court upheld a Maryland statute which prohibited *any corporation* that produced or refined petroleum products from operating a retail service station within the state." (Emphasis added).

Obviously, that statute was not on its face discriminatory as the present ones are, and as it would have been had it applied by its terms only to any corporation "the operations of which are principally conducted outside the state." Conversely, the present constitutional attack would not have been made if the Florida statute effectively omitted that discriminatory qualification.

Though the impact of the regulations scrutinized in *Exxon* was solely on out-of-state concerns (and this impact was separately evaluated in *Exxon* at pages 125-128, as to whether it was merely incidental on one hand or an impermissible burden on commerce on the other), that statute by its terms applied evenhandedly to all identically organized distribution systems, and made no patent distinctions among otherwise identical concerns based solely on geography. This discrimination among otherwise similar objects of regulation, based solely on origin,

is the fatal defect that was specifically found to exist in *Philadelphia v. New Jersey;* which exists in the statutes now scrutinized; and which was found *not* to exist in *Exxon.*

This very distinction was considered sufficiently significant by the Court in *Exxon* to merit specific reference. The Court stated:

> "In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *The absence* of any of these factors fully distinguishes this case from those in which a state has been found to have discriminated against interstate commerce." (Emphasis added) *Id.* at 126.

Conversely, examination of the instant statutes reveals that the *presence* of these same discriminatory factors mandates the conclusion that they are unconstitutional. In *Exxon,* the Court noted an absence of barriers against interstate dealers in the act there considered. In contrast, the statutes involved here create insuperable barriers against out-of-state concerns, by barring them from rendering their services from offices in Florida in the case of § 659.141(1), and by barring them from performing certain services at all in the case of § 660.10. Similarly, while there was no prohibition on the flow of interstate goods in *Exxon,* or the placing of added costs upon them, the flow into Florida of the personal and professional services regulated by § 660.10 is totally prohibited; and the investment advisory and trust services addressed by § 659.141(1) are impeded *and* rendered more expensive

by requiring them to be provided impersonally and from afar. Finally, though the Court in *Exxon* found that there was no distinction between in-state and out-of-state companies in the retail market, both § 659.141(1) and § 660.10 patently and on their face distinguish between otherwise identical in-state and out-of-state companies in their respective service markets.

It was only after noting the absence of these patently discriminatory factors that the Court in *Exxon* undertook to analyze whether or not the differing impact on out-of-state concerns was merely incidental, or constituted an *impermissible* burden on interstate commerce. By this analysis, the Court found that, though the regulation there would cause some businesses to shift from one interstate supplier to another, this incidental effect of an "otherwise valid regulation" was permissible. 437 U.S. at 127.

The obvious prerequisite to this analysis, consistently ignored by Appellant and Bank Supervisors, was a specific finding that the distribution system that was therein prohibited had in fact led to the inequitable distribution of gas during shortage periods, and the Act was generally "designed to correct the inequities in the distribution and pricing of gasoline" that were ascribed to that form of distribution. *Id.* at 121. In contrast, the present statute does not legislate generally and evenhandedly against a specified form of business organization to remedy a specific evil attendant to that organization. It instead discriminates between organizations of *identical*

structure[18] based solely on geographic origin.

II.

THE "BALANCING APPROACH" OF *PIKE v. BRUCE CHURCH* IS NOT REACHED, AND IF REACHED DOES NOT SAVE THESE STATUTES

Bank Supervisors further opines at page 12 of its Brief that the court below should have applied the "balancing approach" of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Bank Supervisors then incorrectly formulates this balancing test as entailing an evaluation of only three factors:

> "Under *Pike*, the court below should have begun its evaluation of each Florida statute by identifying: (1) a local purpose served by the statute; (2) the degree of burden placed on interstate commerce by the statute; and (3) any practical alternatives which would provide the same local benefit with less burden on interstate commerce." Brief of Bank Supervisors at 12.

This statement is in marked contrast to this Court's own formulation in *Pike* of the "balancing approach."

> *Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental,* it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. [Citations omitted]. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will, of course, depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate commerce. Occasionally, the court has candidly undertaken a balancing approach to solving these issues . . . ." (Emphasis added). 397 U.S. at 142.

18/ *i.e.*, all bank holding companies seeking to render trust and investment advisory services in Florida through subsidiaries having a place of business in Florida from which they would furnish trust and investment advisory services in Florida in the case of § 659.141(1); and certain trust companies and national banking associations having trust powers in the case of § 660.10.

The formulation of Bank Supervisors incorrectly presumes without discussion the initial qualification for this test. Bank Supervisors would thereby have this Court ignore that the "balancing approach" will be applied only "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. . . ." As reiterated in *Philadelphia v. New Jersey*, this analysis applies only "where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade . . ." 437 U.S. at 624.

The instant statutes obviously fail to pass muster under any of these qualifications. Initially, it is impossible to say the statutes "regulate evenhandedly" when both §§ 659.141(1) and 660.10 on their face discriminate against otherwise identical objects of regulation based upon in-state and out-of-state considerations. Because of this facial discrimination these statutes fail the "no patent discrimination" test articulated in *Philadelphia* as being a prerequisite to the application of *Pike*. 437 U.S. at 624.

Additionally, the record is totally devoid of any argument that the challenged portions of the statutes effectuate any local public interest whatsoever by treating in-state and out-of-state concerns differently. There has been no evidence, or even contention, that the outright prohibitions against the out-of-state concerns are related to any difficulties in subjecting those concerns to reasonable regulation as to their in-state conduct. Indeed, it has been *stipulated* that: (1) BT Investment is "qualified under the laws of the State of Florida to do business in Florida;" (2) BT Investment is, "amenable to process issued by the courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida . . .;" and (3) Bankers Trust is "ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida."[19] Particularly in light of the stipulated ability of the State of Florida to subject these out-of-state concerns to all legitimate regulations as to in-state conduct, any public interest in prohibiting only out-of-state concerns is illusory.

An argument that the effects of these statutes on interstate commerce are "only incidental" is ludicrous in light of the patent prohibitions contained in the words of the statute. Appellant argues at page 19 of the Jurisdictional Statement that § 659.141(1) "does not prohibit the flow of interstate services" because "non-banking corporations whose principal place of business are out of the state may

19/ Stipulation filed May 11, 1978, at pages 1-3.

supply investment advisory services." This argument ignores the reality that only those bank holding companies which are out-of-state are prohibited from, through their subsidiaries, opening investment advisory offices *in Florida* and that the advisory services to be rendered are highly personal and professional in nature, and to be performed at all, must be rendered expeditiously and in person.

These statutes clearly do not have the requisite qualifications for reaching the balancing test. However, even if that test were reached, these statutes would fail, as the local interest preserved by the discrimination is nil, and the burden imposed amounts to one of total prohibition.

III.

THE ADMITTED DISCRIMINATION OF SECTION 659.141(1), FLORIDA STATUTES, AGAINST INTERSTATE COMMERCE IS CLEARLY NOT AUTHORIZED BY THE BANK HOLDING COMPANY ACT.

At page 14 of its Brief, Bank Supervisors argues that §§ 3(d) and 7 of the Federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1842(d) and 1846 (1976), "specifically authorize" states to adopt laws such as § 659.141(1). Apparently recognizing that such a claim of specific authorization is exceedingly strained, Appellant contends that the Bank Holding Company Act "includes an *implied* authority for a state to prohibit or exclude entry . . ." as Florida has attempted to do through this statute. Jurisdic-

tional Statement at 9 (emphasis added).[20] It is clear from the plain meaning of these statutes that such grant of authority is neither expressed nor implied.

Appellees do not contest that Congress has the power to authorize the states to regulate interstate commerce in specified ways that would otherwise be impermissibly burdensome or discriminatory. In reviewing the statutes cited as granting such authorization, however, Appellant and Bank Supervisors have apparently misconstrued mere *limitations* on the pre-emptive effect of other federal regulatory statutes as affirmative grants of authority by Congress.

Bank Supervisors, at pages 18-20 of its Brief, argues that 12 U.S.C. § 1846 (1976) did not merely announce a Congressional intention not to pre-empt state law, but "was an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner." This argument is inconsistent with the plain meaning of that section. Section 1846 provides:

> "The enactment by Congress of this chapter shall not be construed as preventing any state from exercising such powers and jurisdiction which it

20/ Appellant's argument at pp. 8-12 of the Jurisdictional Statement does not even purport to justify the burden imposed on interstate commerce by § 660.10. Indeed, since Appellant contends § 660.10 has been on the books for over 50 years, it would not have been possible for this statute to have been enacted pursuant to a perceived congressional authorization enacted in 1956.

By arguing that § 659.141(1) was enacted pursuant to a perceived congressional authority to discriminate against interstate commerce, both Appellant and Bank Supervisors admit that this statute is intentionally discriminatory.

> now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

By its plain meaning, this proviso is not an affirmative grant of authority, but states nothing more than what the chapter shall "*not* be construed" to mean. (Emphasis added).[21]

In the instant case, Appellees have never contended that the scrutinized statutes invade areas pre-empted by federal regulation and fully acknowledged that whatever residuum of regulatory power the states have shall be exercised consistent with the preexisting limitations imposed by the Commerce Clause, *i.e.*, that such power may not

21/ *See, e.g., Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds* (venue), ____U.S.____, 47 U.S.L.W. 4844 (June 26, 1979), which held that language similar to 12 U.S.C. § 1846 was intended only to negate an inference that Congress had generally pre-empted the securities law field from state regulation. In the absence of a specific delegation to regulate commerce (which admittedly exists here in 12 U.S.C. § 1842(d), but only as to the acquisition of *banks*), such clauses are mere expressions that the states may continue to exercise pre-existing power, or power "hereafter" acquired, and do not of themselves expand that pre-existing power so as to authorize burdens on interstate commerce.

As quoted from *Great Western* in the opinion of the three-judge court, 461 F. Supp. 1187, 1199:

> "When Congress has exempted state laws from Commerce Clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. . . ."

Holding that language similar to that of § 1846 was not such a specific delegation of power, the court in *Great Western* stated:

> "Rather than allowing violations of the Commerce Clause, § 28 appears to direct only that Federal Securities law should not be interpreted as a wholesale displacement of state securities regulation." 577 F.2d at 1281.

be exercised to discriminate against interstate commerce. In applying these principles to the language of the Bank Holding Company Act, it is clear that such Act and amendments to it affirmatively authorize the states to preclude a bank holding company from acquiring only any additional *bank* in that state, 12 U.S.C. § 1842(d) and that the Congress has expressly refrained from pre-empting the entire field of regulation of bank holding companies, 12 U.S.C. § 1846. However, the mere statement by § 1846 that no federal pre-emption was intended does not in any way expand the original authorization, which allows states to prohibit only the acquisition of *banks.*[22]

22/ At page 19 of its Brief, Bank Supervisors argues that the case of *Commercial National Bank v. Board of Governors,* 451 F.2d 86 (8th Cir. 1971) stands for the proposition that § 1846 constitutes an affirmative authorization for the states to discriminate against or burden interstate commerce in an otherwise unconstitutional manner. That case had nothing to do with whether or not § 1846 constituted an affirmative authorization to burden interstate commerce. Indeed, the Commerce Clause is not even mentioned in it.

In that case, the sole issue was whether or not the application which had been approved by the Board was in fact violative of the Arkansas branch banking statute. The Court in dictum noted that "Arkansas is free to prohibit, by specific legislation, the formation of bank holding companies." 451 F.2d at 89. However, that statement was merely made in the context of whether or not Congress intended the Bank Holding Company Act to pre-empt Arkansas' pre-existing ability to regulate formation of bank holding companies within its borders.

Nowhere is there even an inference of a constitutional attack on or analysis of that statute. Even had such analysis been undertaken, however, it should be noted that the statute examined herein does not purport to evenhandedly apply to all branch banking, or all bank holding companies, as did the Arkansas statute. Instead, the Florida statute blatantly discriminates against only those bank holding companies with a principal place of operation outside Florida.

The Bank Holding Company Act in 12 U.S.C. § 1842(d) requires that the Board may not approve any application by a bank holding company or subsidiary thereof to acquire any interest in

> "any additional *bank* located outside of the state in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment . . . unless, the acquisition . . . is specifically authorized by the statute laws of the state in which such bank is located. . . ." (Emphasis added). 12 U.S.C. § 1842(d).

Appellees acknowledge that Congress has affirmatively barred out-of-state holding company acquisition of banks unless specifically authorized by the states.[23] However, nowhere in the act are the states authorized to bar or discriminate as to acquisitions of companies other than banks.

23/ One clear example of a state statute enacted pursuant to the authorization of 12 U.S.C. § 1842(d) is § 524.1805, Iowa Code (1979 Cum. Supp.). That statute provides:

> "Nothing in this division shall be construed to authorize a bank holding company which is with respect to the state of Iowa an 'out-of-state bank holding company', as defined or referred to in 12 U.S.C. § 1842(d), as amended to January 1, 1971, to acquire any of the voting shares of, any interest in, all or substantially all of the assets of, or power to control in any manner the election of any of the directors of any bank in this state, unless such bank holding company was on January 1, 1971 registered with the federal reserve board as a bank holding company, and on that date owned at least two banks in this state."

Contrary to the assertion of Bank Supervisors that this and several other state statutes enacted pursuant to § 1842(d) are jeopardized by the opinion of the court below, Brief of Bank Supervisors, Appendix, page 21, this statute is vastly different

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Having apparently recognized that § 656.141(1) is (contrary to their earlier assertions) discriminatory against interstate commerce, Appellant and Bank Supervisors go to great lengths in attempts to raise a "construction" that in 12 U.S.C. § 1842(d), Congress really meant more than it said, and also intended to authorize discrimination as to those *other companies* that holding companies may legally acquire.

It is well settled as a matter of statutory interpretation that where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *See, e.g., Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 201 (1976). In this regard, it is difficult to imagine how Congress could have employed any clearer language in this somewhat complex area. The intent is apparent from the language:

23/ *(continued)*
from the Florida one. The Iowa statute, which pertains only to ownership or control of "any bank in this state" is directly keyed to the authorization of 12 U.S.C. § 1842(d). In contrast, § 659.141(1), Florida Statutes, goes far beyond the parameters of the Iowa statute and the authorization of § 1842(d) by attempting to prohibit acquisitions not only of banks, but of other companies such as those performing trust and investment advisory services as well.

Bank Supervisors ignores this distinction, and similar distinctions between the Florida Statute and others which Bank Supervisors lists in its Appendix as endangered by the lower court's holding. Inasmuch as the fate of these other statutes is neither before this court nor relevant to the constitutionality of the obviously discriminatory Florida Statute, see n.15, *supra,* the record will not be further burdened by an analysis or distinction of these statutes.

(1) Holding companies may in some circumstances acquire banks, (12 U.S.C. § 1842) and may in some circumstances acquire other companies, 12 U.S.C. § 1842-1843; (2) by 12 U.S.C. § 1842(d) Congress prohibited the acquisition of "banks" across state lines without specific permission of the states; (3) nowhere in either §§ 1842 or 1843 is there expressed an authorization to states to discriminate as to other acquisitions.[24]

24/ It is recognized that Congress has the *power* to phrase its authorizations to burden commerce very generally. For example, Congress *could have* stated in the Bank Holding Company Act that no holding company could be relieved from compliance with any state law regulating bank holding companies on the ground that the holding company was engaged in interstate commerce. Such a general delegation was employed by Congress in statutes examined in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946). Even simpler, Congress could have, as discussed below, merely used the word "company" in § 1842(d) instead of the word "bank." Thus, Congress could have easily and directly authorized the states to probibit acquisitions by bank holding companies of "any additional company" as opposed to the much narrower authorization to prohibit acquisitions of "any additional bank." Section 1842(d) eschews this general authorization and specifically extends only to allowing states to probibit acquisition of banks.

At pages 14 through 17 of its Brief, Bank Supervisors correctly states that Congress has the power to authorize state burdens on interstate commerce and that Congress has authorized this power in the instance of acquisitions of "any additional bank," but then incorrectly posits the issue as follows:

> "Since Congress authorized states to discriminate against out-of-state holding companies the next question is how specifically it limited the authorization." Brief of Bank Supervisors at 17.

The language of § 1842(d) contains no such *general* authorization to discriminate, but only the *limited* one to discriminate as to acquisitions of banks. Thus, Bank Supervisors incorrectly leaps from a limited authorization to the assumption of a general one, and then inquires as to what limitations exist on the wrongly posited general authorization. Rather than examining the extent of the limited language of § 1842(d), the analysis of Bank

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The Bank Holding Company Act very clearly recognizes that bank holding companies have the power to acquire interests in companies other than banks. Specifically, 12 U.S.C. § 1843 fully recognizes and extensively restricts "interests in non-banking organizations" which organizations are clarified to be "any company not a bank."[25] It is therefore obvious that the Bank Holding Company Act contemplates that holding companies may in different specified circumstances acquire interests in both "banks" and "companies not banks," and that states are authorized to discriminate against out-of-state holding companies only in the acquisition of "banks" within the state.

The differing treatment afforded to acquisitions of "banks" and acquisitions of "any company not a bank" has always permeated the Bank Holding Company Act. Though all acquisitions by bank holding companies are covered within the Act, the differing treatment afforded

24/ *(continued)*
Supervisors would have this court ignore this initial inquiry. The plain meaning of § 1842(d) extends only to the acquisition of banks, and nowhere in the Bank Holding Company Act is there any authorization for the states to discriminate against interstate commerce in the acquisition of companies other than banks.

25/ Pursuant to 12 U.S.C § 1843(c)(8) the Board has determined at 12 C.F.R. §§ 225.4(a)(4) and (5) that certain trust company functions and acting as an investment or financial advisor are business activities "so closely related to banking . . . as to be a proper incident thereto." Subject to other qualifications, stated in the Bank Holding Company Act, non-banking companies involved in such closely related activities may be acquired by bank holding companies. Thus, entities which exist to offer investment advisory services, such at BT Investment, are clearly among those "non-banking organizations" which a bank holding company may acquire.

to acquisitions of "banks" and acquisitons of other "companies" is initially facilitated by the statement of very disparate definitions of those terms. It is evident from such definitions, contained in 12 U.S.C. § 1841(b) and (c), that the term "company" is defined expansively to emcompass practically any perpetually existent business entity.[26] The term "bank" on the other hand, is more explicitly defined in § 1841(c) to emcompass only those entities with specific attributes, primarily the accepting of deposits that may be withdrawn on demand, and engaging in the activity of making commercial loans.[27]

These definitions facilitate and are clearly used to provide different regulatory treatment as to the circumstances under which a bank holding company may acquire "any additional bank," § 1842(d), and the circumstances under which a bank holding company may

26/ The term "company" is presently defined as follows:
"(b) 'Company' means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.***"

27/ That definition provides:
"(c) 'Bank' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under Section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States."

acquire interests in "any company not a bank," § 1843.[28]

To argue that § 1842(d), which by its clear terms authorizes states to prohibit acquisitions only of "any additional bank", was really intended to authorize the states to prohibit acquisitions of any additional bank *or other company engaged in closely related activities*, as Bank Supervisors argues at page 18, is directly inconsistent with these definitions, and with the different sets of regulatory requirements pertaining to these separate types of acquisitions. Similarly, Appellants erroneously argue at Jurisdictional Statement page 10, that allowing acquisitions of closely related companies in circumstances where the states are authorized to prohibit only acquisition of "banks" is a "loophole" in the law. This argument ignores

28/ This differing regulatory treatment clearly appears from both the titles and substantive provisions of § 1842 and § 1843. The title of § 1842 is "Acquisition of *bank* shares or assets — prior approval of Board as necessary; exceptions." (Emphasis added). This is contrasted with the title of § 1843 which reads "Interests in non-banking organization — ownership or control of voting shares of any *company not a bank;* engagement in business *other than* that of banking."

The congressional usage of words cannot be taken lightly and such usage was presumptively determined by resort to the definitions that Congress took pains to include in the statute. Clearly, if Congress had intended § 1842 to govern the acquisition of both banks and other companies which are not banks it would have been a simple matter for Congress to have provided in § 1842, and specifically sub-section (d) of that section, that it apply to the acquisition of "any additional *company.*" Instead, Congress provided that such sub-section should apply only to the acquisitions of assets of "any additional *bank.*" In contrast, it is § 1843 which by its own specific terms addresses the circumstances under which bank holding companies may acquire interest in "any company not a bank." Totally absent from that section is any authorization to a state to prohibit or discriminate in such acquisition.

the fact that Congress specifically afforded different definitions to facilitate a distinction between banks and other companies, and utilized this distinction for the purpose of relegating to the states the authority to totally prohibit the acquisition of banks, while retaining a separate federal statutory scheme as to the regulation of acquisition of all other companies.

By resort to misreading of definitions, exceptions to definitions, and legislative history, Appellants and Bank Supervisors attempt by convolution to establish that when Congress spoke of acquisition of "any additional bank" in § 1842(d), it really meant "any additional bank or other company that a bank holding company might attempt to acquire." This expansion is as inconsistent with those definitions and legislative history as it is with the plain meaning of § 1842(d). Again, the term "bank" is defined in 12 U.S.C. § 1841(c) (1976) as:

> "Any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) engages in the business of making commercial loans."

Bank Supervisors asserts that those institutions which are not actually engaged in "commercial banking" are excluded from this definition of "bank." At pages 17 and 18 of its Brief, Bank Supervisors then makes an attenuated argument that since activities such as investment advisory services might be contemplated by the term "commercial banking," investment advisory services do not fall within the exclusion from the definition and must therefore somehow be included within the original definition of a bank. This circumlocution ignores the direct reality that in proposing to establish an investment advisory service

in Florida, Appellees do not attempt to acquire "any additional bank" because the institution to be established does not meet the basic definition of "bank," to wit, that institution does not accept deposits that a depositor has a legal right to withdraw on demand, and it does not engage in the business of making commercial loans.[29]

29/ Aside from the fact that Bank Supervisors' circumlocution is internally illogical (in that it asserts the non sequitur that merely because investment advisory services do not come within the "exclusion" from the definition of "banks," these activities must necessarily fall within the inclusive terms of the definition) even a cursory reading of the committee report relied upon by Bank Supervisors demonstrates that comments from the committee report are taken badly out of context so as to lead the reader to the incorrect conclusion as to the effect of the amendment.
From the plain meaning of the 1970 Amendment and the committee report, it is clear that the amendment to the definition of "bank" in 1970 had the intended effect of *narrowing* that definition, *not expanding* it. Prior to 1970, that definition did not include the qualification that, in order to be considered a bank, an institution must be one that made commercial loans. The addition of that qualification in 1970 very clearly restricts that definition (and the concomitant authority granted to the states to engage in discriminatory prohibitions of acquisition of "banks") to apply only to those institutions which make commercial loans and thereby control commercial credit — where the potential for economic concentration is the greatest. Speaking of this change, the committee report notes:

"Banks as defined in the Act must accept demand deposits and engage in the business of making commercial loans. The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since *the purpose of the Act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit*. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the

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The attempt of Bank Supervisors to extend the clear term "bank" to include investment advisory services by resort to *Iowa Independent Bankers v. Board of Governors*, 511 F.2d 1288 (D.C.Cir. 1975) *cert. denied* 423 U.S. 875 (1975), is similarly futile. Though that case is quoted by Bank Supervisors at page 18 of its Brief, for the broad proposition that § 1842(d) was enacted to "assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy," it is clear from a reading of the case that the expansion contemplated was the acquisition of "banks." The statute under scrutiny there is quoted at n.23, *supra*. That statute, just as § 1842(d) itself, dealt *only* with acquisitions of "banks." 511 F.2d at 1972.

At pages 8 thru 12 of the Jurisdictional Statement, Appellant further argues that the three-judge court wrongly construed the 1970 amendments to the Bank Holding Company Act of 1956, stating:

> "The court below seems to reject the Appellant's contention that the 1970 amendments did not change the original congressional purpose behind

29/ *(continued)*
business of making commercial loans from the definition of "bank." (Emphasis added). S.Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* [1970] *U.S. Cong. & Ad. News* 5519, 5541.
Thus, contrary to the conclusion reached by Bank Supervisors Code by taking this "commercial banking" exclusion out of context, the 1970 Amendment was clearly intended to *narrow* the definition of "bank" and further demonstrates that Congress intended to specifically and restrictively define that term as it is used throughout the Bank Holding Act.

> enactment of the Bank Holding Company Act of 1956, which was to limit the concentration of economic power in the hands of bank holding companies. . . ." Jurisdictional Statement at 12.

This "red herring" is a clear mischaracterization of the three-judge court's holding. Indeed, before discussing the effect of the 1970 amendments, the court concluded that "defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies) . . ." 461 F. Supp. at 1200. The three-judge court simply recognized that, consistent with all the legislative history of the Bank Holding Company Act and its amendments, acquisition of "any additional bank" under 12 U.S.C. § 1842, and acquisition of interest in "any company not a bank" under 12 U.S.C. § 1843 are separate regulatory provisions.[30]

Appellees never argued and the three-judge court did not find that the general purpose of the 1956 Act has

30/ Indeed, review of the entire committee report furnishes even further support for Appellees' contention that Congress intended two schemes of regulation — one as to acquisitions of banks, and one as to acquisitions of companies other than banks. In reviewing its own prior report as to the original 1956 Act, the committee states:

> "That report indicated that there were two primary problems involved with bank holding companies. One was the unrestricted ability of such a company to obtain banking units, thereby concentrating the commercial bank facilities in a particular area under a single control. The other was the combination, again under a single control, of banking and nonbanking enterprises." 1970 *Cong. & Ad. News* at 5520.

Thus, the committee's intent clearly comports with the plain meaning of the Act, in that even though the Act covers acquisitions by bank holding companies of "banks" and of other "companies" it clearly recognizes these two areas are separate legislative "problems," and deals with them separately.

changed. Rather, the 1970 amendments eliminated one of the major statutory restrictions previously existing as to companies that could be acquired, and thus evidenced a congressional intent to liberalize acquisitions by holding companies of companies other than banks.[31] This liberalization is plainly inconsistent with any argument that the 1956 Act had "impliedly" authorized the states to completely prohibit acquisition by holding companies of companies other than banks.

The three-judge court apparently agreed with Appellees' reading of the 1970 amendments. Since that court determined that authority to acquire interests in companies other than banks was being congressionally expanded, it simply concluded that such expansion was inconsistent with raising an implication that the word "bank" as used in 12 U.S.C. § 1842 even authorized the states to engage in total prohibition as to such acquisitions.

31/ Prior to the 1970 amendments, one of the restrictions contained in 12 U.S.C. § 1843(c)(8) was that bank holding companies could be allowed to obtain interests only in companies other than banks "all activities of which are of a financial, fiduciary, or insurance nature . . ." By deleting this pre-existing restriction in 1970, the Congress plainly and significantly expanded the types of companies which might qualify for possible acquisition by bank holding companies. Reaching a similar conclusion as to the liberalizing effect of the 1970 amendments on non-bank acquisitions, *see, National Couriers Association v. Board of Governors*, 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act*, 60 Geo. L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities*, 71 Mich. L. Rev. 1970 (1973); Legis. Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971).

The three-judge court's interpretation is completely consistent with the case of *Investment Company Institute v. Board of Governors of the Federal Reserve System*, ____F.2d____, Case No. 77-1862 (D.C.Cir. March 30, 1979) discussed at pages 11-12 of the Jurisdictional Statement.[32]

Indeed, while Appellant is technically correct in stating that the decision of *Investment Company Institute* "was not available at the time [the three-judge court] entered its judgment and its order altering the judgment . . .," Jurisdictional Statement at 11, such an assertion is somewhat misleading in that *Investment Company Institute* was the subject of extensive briefing in support of and in opposition to the Appellant's later Motion to Suspend Injunction and Stay Judgment. Thus, the three-judge court had full opportunity to consider this decision and did consider it in denying that motion.

Completely aside from the clear correctness of the three-judge court's reading of the 1970 amendments,

32/ In *Investment Company Institute, supra,* the D.C. Circuit specifically acknowledged that (for reasons of legislative history that need not be discussed here) deletion of certain other language which had been contained in the 1956 Act "significantly liberalized the strictures of § 4(c)(8)." *Id.* at 32. It was this same Circuit which had recently concluded after a review of the "seemingly slight" 1970 amendments that they were indeed a major liberalization. The court stated in *National Couriers Association v. Board of Governors of the Federal Reserve System,* 516 F.2d 1229, 1236 (D.C.Cir. 1975):

> "Though the precise amount of the intended increase in the latitude to be given the bank holding companies is something of a puzzle, *it is plain that Congress intended to expand that latitude in substantial degree.*" (Emphasis added).

however, it is also apparent that the lower court addressed only the circumstances under which a bank holding company can acquire an interest in "any company not a bank." There is nothing in the wording of those amendments to suggest abolition of the previously existing dichotomy wherein acquisition of banks is dealt with in 12 U.S.C. § 1842(d) and acquisitions of "any company not a bank" is governed by § 1843. Thus, aside from the fact that circumstances for acquisition of companies other than banks were being expanded by the 1970 amendments, those amendments were also a reaffirmation that Congress intended to perpetuate a separate set of restrictions as to acquisitions of "any company not a bank" and that such companies are not impliedly subsumed within the term "bank," in § 1842(d).

Conclusion

Sections 659.141(1) and 660.10, Florida Statutes (1977), are patently discriminatory against interstate commerce. As to § 659.141(1), Appellant and Bank Supervisors admit in their arguments that it was intentionally enacted pursuant to a perceived congressional authorization to discriminate. As such, these statutes are *per se* violative of the Commerce Clause of the United States Constitution. Neither debate nor further argument will alter this inescapable result.

Additionally, by the plain meaning of the Bank Holding Company Act, it is clear that the states have not been authorized to discriminate against out-of-state bank holding companies in their otherwise legal acquisitions of companies other than banks, and that the Bank Holding Company Act does not save these unconstitutionally discriminatory enactments.

Therefore there is no question, substantial or otherwise, as to the correctness of the three-judge court's Order and Opinion, no further argument is required, and the Motion to Affirm should be granted.

Respectfully submitted,

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Date: August 24, 1979

1. The entire text of the Federal Reserve Board's Order Denying Proposal to Act as an Investment Adviser is set forth herein.

BANKERS TRUST NEW YORK CORPORATION, NEW YORK, NEW YORK

Order Denying Proposal To Act As An Investment Adviser

Bankers Trust New York Corporation, New York, New York ("BTNYC"), a bank holding company within the meaning of the Bank Holding Company Act, has proposed under § 4(c)(8) of the Act and § 225.4(b)(1) of the Board's Regulation Y, to engage indirectly *de novo* in the performance of certain investment advisory activities, through B T Investment Managers, Inc., Palm Beach, Florida ("BTIM"), a wholly-owned subsidiary of BTNYC.

Notice of the proposal, affording opportunity for interested persons to express or submit comments and views on the proposal, has been published (September 25, 1972, *The Wall Street Journal* and September 26, 1972, West Palm Beach *Commercial Record)* in accordance with § 225.4(b)(1) of the Board's Regulation Y. The time for filing comments and views has expired, and all those received, including those of the Comptroller of Florida, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc. have been considered in light of the factors set forth in § 4(c)(8) of the Act (12 U.S.C. 1843(c)(8)). Among those letters commenting on the proposal were requests for a hearing: those persons seeking a hearing were asked what substantial issues of

material fact, if any, were presented by the instant proposal and why any issues raised could not be resolved by the submission of written comments. Prior to receipt of responses to these questions, the Board was apprised that on November 30, 1972, the Florida Legislature enacted legislation[1] that became effective on December 21, 1972.

1/ The legislation amended section 659.141 of the *Florida Statutes*. Section 659.141, as amended, provides, in pertinent part:

659.141(1) Control; ownership.—

(1) Except as provided in subsection (3) of this section no bank, trust company, or holding company, the operations of which are principally conducted outside this State, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this State where the business of banking, or trust business or functions are conducted or acquire, retain or own all or substantially all of the assets of or control over, any business organization having a place of business in this State where or from which it furnishes investment advisory services in this State. However, if a bank, trust company, or holding company directly or indirectly owning all or substantially all the assets of, or having control over a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section be or become disqualified hereunder to acquire, retain or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding two years from the effective date of this Act or from the date it becomes disqualified hereunder, whichever is later, unless said period of two years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of two years from time to time if the department determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed one year and all thereof shall not in the aggregate exceed three years.

* * *

(Continued next page)

Subsequently, the Board entertained briefs and written argument on the issue of the applicability and effect of the amended statute on the instant proposal from those persons that had requested to be heard.

Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest,[2] it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have pro-competitive effects, and consequently should be viewed more favorably than the commencement of an activity through the acquisition of an existing concern"[3] and "where a bank holding company enters a new market *de novo* . . . , its desire to succeed in its new endeavor is more likely to be

1/ *(Continued)*

(2) . . .

(c) A business organization provides investment advisory services if, in this State for compensation, it engages in the business of advising persons, as defined in § 1.01(3), Florida Statutes, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisabilty of investment in or purchasing securities, or if, not being a certified public accountant, in this State and for compensation it issues or distributes to persons, as defined in § 1.01(3), Florida Statutes, analyses or reports concerning securities.

2/ See the Board's Order of March 6, 1973, denying the application of First at Orlando Corporation to acquire shares of Citrus First National Bank of Leesburg, 38 *Federal Register* 6317 (March 8, 1973) and the Board's Statement accompanying its Order of March 9, 1973 approving, to the extent permitted by State law, the proposal of NCNB Corporation to engage in certain trust activities in South Carolina through American Trust Company, 1973 Federal Reserve BULLETIN 305.

3/ *S. Rep.* No. 91-1084, 91st Cong., 2d Sess. 16 (1970).

competitive."[4] However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. The legislation further provides however that the restrictions and prohibitions contained therein shall not be enforced for a period of time ranging up to five years against any holding company which, prior to the effective date of such legislation, acquired control over a business organization to which the restrictions or prohibitions of the statute apply.

There appears to be tacit agreement that the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. However, BTNYC has contended that, under the "grandfather" provision in the statute, BTIM may open for business and engage in the provision of investment advisory services for a period of approximately two years. The protestants to the proposal, with the concurrence of the Comptroller of Florida, have contended that the "grandfather" benefit, conferred by the newly-enacted legislation, is not available to BTNYC or BTIM. However, assuming, without deciding, that the construction given the "grandfather" provision by BTNYC is correct, the Board perceives, as a possible adverse effect of the instant proposal, the indefinite and temporary nature of BTIM's performance of investment advisory services. The public is ill-served by a firm offering investment ad-

4/ *H. R. Rep.* No. 91-1747, 91st Cong., 2d Sess. 17 (1970).

visory services that may, by law, have to be terminated within a relatively short time period. Customers entering into contracts for such services would generally do so in reliance upon the continuing and long-term nature of such services. In another sense, one may question the vigor with which an entrant into a market will compete and the quality of the services it will offer, if its employees are burdened by the realization that, irrespective of their performance, their duty is only temporary and the office may be closed at any time. However, in view of the disposition of the instant proposal on other grounds, the Board is not required to decide at this time whether the possibility of such an adverse effect is of sufficient weight as to outweigh the public benefits that may reasonably be expected to derive from the instant proposal, notably the increased competition probably resulting from *de novo* entry.

In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it.[5] In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.[6] The interpretation and construction of controverted State statutes is a task that is not eagerly undertaken by the Board. Certainly, the courts of Florida are a more appropriate forum for the

5/ *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

6/ See Statement accompanying the Board's Order of March 9, 1973, approving, to the extent permitted by State law, the proposal of NCNB Corporation, Charlotte, North Carolina, to operate a trust company in South Carolina through American Trust Company, 1973 Federal Reserve BULLETIN 305.

resolution of disputed questions of Florida law, than is the Board. Nevertheless, the Board believes that the principle laid down by the Supreme Court in the *Whitney* case requires the Board to initially resolve the legal issue presented here.

The issue which is determinative of the instant proposal is whether the "grandfather" provision of the recently-enacted legislation effectively permits BTNYC to initiate investment advisory services from a Florida office, albeit for an indefinite and temporary period of time. BTNYC states, and, the Board finds that BTIM was incorporated in the State of Delaware on November 24, 1972, at the direction of BTNYC, and that, on November 27, 1972, BTIM qualified with the Secretary of State of Florida to do business in Florida. However, BTNYC has not alleged that BTIM, at any time, has had a place of business in Florida or that BTIM has furnished investment advisory services in Florida. Nor could BTIM legally have done so, the prior approval of the Board not having been secured by BTNYC. It is not contended that BTIM is either a bank or trust company.

One the basis of these facts, BTNYC contends, and the protestants do not contend otherwise, that BTIM is a "business organization"; that BTNYC has "control" over BTIM and had acquired that control prior to becoming disqualified under the newly-enacted legislation. The protestants, on the other hand, contend that, irrespective as to whether BTIM is a "business organization" or whether BTNYC controlled BTIM prior to the effective date of the amendment, BTNYC is not entitled to "grandfather" benefits because BTIM did not furnish investment advisory services in Florida from a place of business in

Florida on the effective date of the legislation. In the Board's opinion, the conclusion is inescapable that the "grandfather" provison of the legislation only applies to a bank, trust company or business organization "having a place of business in [Florida] where or from which it furnishes investment advisory services in [Florida]" on the effective date of the legislation. Since BTIM is neither a bank or a trust company, and did not have on the date a place of business in Florida where or from which it furnished or provided investment advisory services, the Board concludes, as a matter of law, that BTNYC is not entitled to the benefits of the "grandfather" provision in section 659.141.

Furthermore, the legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. In view of the conflicting constructions given the "grandfather" provision, the Board believes that an examination of the legislative history of the legislation is appropriate to ascertain the legislative intent. It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Accordingly, the Board concludes that, the "grandfather" provision was not intended to permit the instant proposal, even for a limited period of time.

BTNYC, besides contending that the Board should refrain from construing the newly-enacted Florida legisla-

tion, contends that they are entitled to "grandfather" benefits because the "grandfather" provision, which authorizes the Florida Banking Department to determine the length of time during which the statute shall not be enforced against a company entitled to "grandfather" benefits, constitutes an unconstitutional delegation of authority to that agency. As the Board has previously indicated, it will presume the constitutional validity of State statutes. BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the propsal.

The Board is not unsympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." There is substantial evidence that the celerity with which the legislation was enacted is directly attributable to the pendency of the instant proposal before the Board. However, section 7[7] of the Act expressly reserves to the States the authority to

7/ Section 7 of the Act provides:
The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (12 U.S.C. 1846).

adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and the effect of any such legislation. Accordingly, irrespective of any doubt the Board may entertain as to the wisdom or desirability of a particular State enactment, the Board must, and will, respect, and act in the light of, pertinent State legislative judgments.

Based upon the record and for the reasons expressed herein, the proposal of BTNYC Corporation to provide investment advisory services in Florida through the instrumentality of BTIM, is hereby denied.

By order of the Board of Governors, effective April 26, 1973.

Voting for this action: Vice Chairman Robertson and Governors Daane, Brimmer, Sheehan, and Bucher. Absent and not voting: Chairman Burns and Governor Mitchell.

(Signed) CHESTER B. FELDBERG,
[SEAL] Assistant Secretary of the Board.

1. The pertinent portion of § 659.141(1), Fla. Stat. (1972 Supp.) provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire or retain, directly or indirectly, all or substantially all the assets of, or control over, any trust company having a place of business in this state where trust business or functions are conducted, or acquire or retain all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services to trust companies or banks in this state.***

2. The pertinent portion of 12 U.S.C. § 1841(b) (1976) provides:

(b) "Company" means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

12 U.S.C. § 1841(c) (1976) provides:

(c) "Bank" means any institution organized under the laws of the United States, any State of the United States,

the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

3. The pertinent portion of 12 U.S.C. § 1842 (1976) provides:

§ 1842. Acquisition of bank shares or assets—Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval

* * *

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State

bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. 12 C.F.R. § 225.4(b)(1) (1978) provides:

§ 225.4 Nonbanking activities.

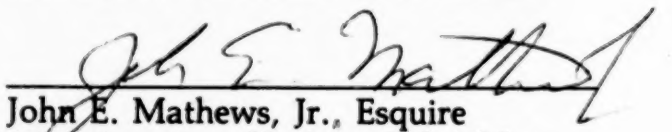
* * *

(b)(1) *De novo entry.* A bank holding company may engage de novo (or continue to engage in any activity earlier commenced de novo) directly or indirectly, solely in activities described in paragraph (a) of this section, 45 days after the company has furnished its Reserve Bank with a copy of a notice of the proposal (in substantially the same form as FR Y-4A) published within the preceding 30 days in a newspaper of general circulation in the communities to be served, unless the company is notified to the contrary within that time or unless it is permitted to consummate the transaction at an earlier date on the basis of exigent circumstances of a particular case. If adverse comments of a substantive nature are received by the Reserve Bank within 30 days after the company has so published its proposal[12] or if it otherwise appears appropriate in a particular case, the Reserve Bank may inform the company that (i) the proposal shall not be consummated until specifically authorized by the Reserve Bank or by the Board or (ii) the proposal should be processed in accordance with the procedures of paragraph (b)(2) of this section.

Proof of Service

I, John E. Mathews, Jr., attorney for BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1979, I served copies of the foregoing Motion to Affirm and Brief on Gerald A. Lewis, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, by mailing 3 copies in a duly addressed envelope with postage prepaid to Eugene Cella, Esquire, his general counsel and attorney of record herein, The Comptroller's Office, The Capitol Building, Tallahassee, Florida, on Amicus Curiae, The Conference of State Bank Supervisors, by mailing 3 copies in a duly addressed envelope with postage prepaid to Erwin N. Griswold, Esquire, and James F. Bell, Esquire, Jones, Day, Reavis & Pogue, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036, as counsel of record for said Amicus Curiae, and on Amicus Curiae, The New York Clearing House Association, by mailing 3 copies in a duly addressed envelope with postage prepaid to H. Rodgin Cohen, Esquire, Sullivan and Cromwell, 125 Broad Street, New York, NY 10004, as counsel of record for said Amicus Curiae.

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Supreme Court, U. S.
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No. 79-45

IN THE

Supreme Court of the United States

October Term, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE,* IN SUPPORT OF THE MOTION TO AFFIRM

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August 24, 1979

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IN THE

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BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE,* IN SUPPORT OF THE MOTION TO AFFIRM

This brief is filed under Rule 42(1) of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association, founded in 1853, is an association of twelve leading banks in the City of New York, each of which is owned by a bank holding

company.[1] The Association clears commercial drafts and items in the New York area and, through its counsel, files briefs before courts of appellate jurisdiction in cases that raise questions of law materially affecting banks or their affiliates.

The bank holding company organizations of which the Association's members are a part have a strong and direct interest in being able to compete in the offering of investment advisory, trust and other services throughout the Union, free of discriminatory state regulation unauthorized by Congress.

Statement

Appellee Bankers Trust New York Corporation ("Bankers"), a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (the "Act"), seeks to offer investment advisory and trust services in Florida through local offices of a nonbank subsidiary (B2-7).[2] Bankers has been prevented from doing so by reason of the statutes held invalid below, Florida Statutes

[1] The members of the Association are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Bank of North America and European American Bank & Trust Company.

[2] Appellee BT Investment Managers, Inc. is a Delaware subsidiary of Bankers formed for the purpose of conducting an investment advisory business in Florida (B2). "B," "C" and "D" citations are to the appendices to the Jurisdictional Statement ("JS") so entitled.

§ 659.141(1) (first sentence)[3] and § 660.10 (B4-7). Those statutes, reprinted at C1-4, in conjunction prohibit any bank holding company whose operations "are principally conducted outside" Florida from competing in the investment advisory and trust businesses in Florida.[4]

The district court held the statutes invalid under the Commerce Clause, as being in both purpose and effect purely "discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce" (B11). The court's conclusion as to purpose and effect is inescapable from the statutes themselves (see B12) and from the circumstances of the hurried amendment of § 659.141(1) (see B4-5, B15-16) and has been concurred in by both the Federal Reserve Board, 59 Fed. Res. Bull. 364, 366, and the Fifth Circuit, 559 F.2d 950, 954 & n.13, in earlier proceedings. The

[3] The judgment below did not extend to that portion of the first sentence of § 659.141(1) that prohibits out-of-state bank holding companies from acquiring *banks* located in Florida (D1-2). Congress has itself prohibited such acquisitions, absent affirmative legislative consent by a particular State. 12 U.S.C. § 1842(d).

[4] Although the district court declared both statutes unconstitutional, it enjoined the enforcement only of the relevant portion of § 659.141(1), finding that an injunction would be premature as to § 660.10 (B22). We agree with Appellant ("Florida") that all aspects of the decision below are now before the Court (JS at 8). As Florida acknowledges (JS at 14), however, it was the *combination* of § 659.141(1)—which prohibited Bankers from owning a Florida trust company—and § 660.10—which prohibited all corporations other than Florida banks and trust companies from rendering trust services within Florida—that wholly precluded Bankers from providing trust services in Florida, and it was that statutory preclusion which was invalidated and is in issue here. Whether § 660.10 in isolation would be constitutional was not raised or decided below, and thus the second of Florida's Questions Presented (JS at 4, discussed JS at 13-16) goes beyond the confines of the controversy between the parties and is not, in its broad terms, a question "on which decision of the cause depends" (see Rule 16(1)(c) of the Rules of this Court).

district court also rejected Florida's contention that Congress has consented to such otherwise unconstitutional discrimination (B17-21).

Florida and the Conference of State Bank Supervisors as *amicus curiae* ("State Supervisors") argue here both that Florida's discriminatory legislation is proper "regulation" under the Commerce Clause and that, in any event, Congress has consented to it, though they appear to rely more heavily on the second contention. Their constitutional argument rests on a distorted reading of this Court's controlling decisions, and their attempt to create congressional consent depends on a tortured analysis that wholly rejects the structure and language of the Act and its legislative history. Both arguments are plainly wrong and neither presents a question "so substantial as to require plenary consideration" by the Court (see Rule 15(1)(f) of the Rules of this Court).[5]

[5] Though it is immaterial to the substantiality of the legal questions presented, the fact is that *none* of the other state statutes listed by State Supervisors (Brief at 21) is comparable to Florida's legislative scheme (see note 4, page 3, *supra*) because none precludes out-of-state holding companies from offering investment advisory services through local offices and subsidiaries or from establishing local trust company subsidiaries. The majority of the statutes cited simply prevent out-of-state holding companies from acquiring in-state *banks* and as such are clearly valid in light of 12 U.S.C. § 1842(d) (see note 3, page 3, *supra*). The others merely prohibit out-of-state corporations from serving in certain fiduciary capacities. State Supervisors' assertion that the "rationale" of the decision below could jeopardize a "significant number" of these statutes (Brief at 21) is incorrect.

ARGUMENT

I.

Florida's Protectionist Statutes Are Invalid Under the Commerce Clause.

In the "few simple words of the Commerce Clause" the Framers carried out their determination that commerce among the States be subjected to the power of the Nation in order to thwart "the tendencies toward economic Balkanization" that had plagued the country before Independence and under the Articles of Confederation. *Hughes* v. *Oklahoma,* 441 U.S. —, 99 S.Ct. 1727, 1731 (April 24, 1979); *see Baldwin* v. *G.A.F. Seelig,* 294 U.S. 511, 522-23 (1935) (Cardozo, J.). To carry out that mandate, this Court has for nearly a century held that the Commerce Clause operates as a restriction on permissible state regulation even in the absence of conflicting federal legislation. *See, e.g., Wabash, St. Louis & Pacific Railway* v. *Illinois,* 118 U.S. 557 (1886); *Hughes* v. *Oklahoma, supra; see also Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.) (dictum).

Accordingly, the Court has consistently stricken down state legislation that restricts or bars interstate commerce while serving no local purpose other than the elimination of out-of-state competition. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978).

Florida's "brazen attempt"[6] legislatively to shield its local business interests from the prospect of interstate com-

[6] *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954 n.13 (5th Cir. 1977).

petition is, as recognized below, classic protectionism. On their face, the invalidated statutes discriminate against interstate commerce as such and have no other discernible purpose or effect. Indeed, they entirely deny firms located outside Florida the ability to do business in Florida, preserving that business for Florida-based firms.[7]

This case thus involves an actual prohibition of interstate commerce, not merely a burden (incidental or otherwise) on commerce, and presents at least as appropriate an occasion as *Philadelphia* v. *New Jersey* for application of a *per se* rule of invalidity.[8] Nothing in *Hughes* v. *Oklahoma,* handed down after the decision below and cited by Florida (JS at 17), or in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), relied on by State Supervisors (Brief at 12), suggests otherwise; indeed, application of the *Pike-Hughes*

[7] Florida cursorily attempts to argue that the statutory "burden falls equally on foreign and domestic businesses alike" (JS at 18) because the prohibitions of § 659.141(1) turn not on whether a company has incorporated outside Florida, but rather on whether its business operations are "principally conducted outside" Florida. The Florida legislature obviously chose the most commercially meaningful definition of a "non-Florida" firm in its discriminatory enactment; Florida's specious contention here merely highlights the fact that, for a company with a substantial interstate business, the statutory prohibition is unavoidable even by incorporating in Florida, and thus is total. Likewise, the "grandfather" provision pointed to by State Supervisors (Brief at 12), which in application is an extremely narrow exception, merely confirms that the legislative purpose and effect were to protect those now in the market from new competition.

[8] Two members of the Court considered the provision held invalid in *Philadelphia* v. *New Jersey* to be a public health measure, not a regulation of "commerce" in the normal sense and certainly not designed to protect the economic interests of New Jersey's commercial community. They would have held that it did not unlawfully burden commerce—although it wholly precluded the commerce involved—in merely allowing locally generated waste, which had to be disposed of somehow, to continue to be used as landfill within the state. 437 U.S. at 629-33 (Rehnquist, J., dissenting). No such analysis is possible here; Florida's sole purpose and effect is the prohibition of interstate commerce.

three-point test, *see* 99 S.Ct. at 1736, confirms the patent (*i.e., per se*) invalidity of Florida's protectionist scheme:

> (1) The challenged statutory scheme does not regulate "evenhandedly"; indeed, it does not "regulate" at all except by discriminating against interstate commerce on its face *and* in effect.
>
> (2) The statute serves no "legitimate local purpose"; its only purpose is protection of local business interests against competition from interstate firms.
>
> (3) The availability of less discriminatory alternatives is not even raised since there is no "legitimate" local purpose, merely the purpose and effect of precluding competition by interstate firms.[9]

Application of the "balancing test" urged by State Supervisors (Brief at 12) thus leads simply to the conclusion that the statutes are in fact *per se* invalid.[10]

[9] Florida has not here advanced its novel—indeed, almost Orwellian—economic contention below that statutes limiting the number of competitors were intended to enhance competition (see B12). Even had that been Florida's purpose, the statutes are not "evenhanded," their effect on interstate commerce is not "incidental," and the availability of nondiscriminatory alternatives is obvious (*e.g.,* regulatory supervision of all competitors and vigorous enforcement by the State of state and federal antitrust laws). Moreover, discrimination against interstate commerce having been established, the burden was on Florida to show both concrete local benefits and "the unavailability of nondiscriminatory alternatives adequate to preserve" those benefits. *Hughes, supra,* 99 S. Ct. at 1736.

The district court, in addition to finding that Florida's only purpose was discrimination, found that Florida lacked any factual basis for its contention that the statutes were necessary and appropriate to the alleged objective of preserving competition (B14-15); far from being clearly erroneous, these findings are irrefutable, as Florida apparently concedes.

[10] The dissent in *Hughes* is in no way inconsistent with this analysis, which has been common ground in the Court's commerce clause decisions. Rather, Mr. Justice Rehnquist's opinion rested, *inter alia,* on the long-recognized special state interest in wildlife conservation, the fact that the statute in question applied equally to local and multistate firms and the fact that it was *not* designed "for the benefit of the local economy." 99 S.Ct. at 1739-41.

Nor does *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), upon which both Florida and State Supervisors rely, lend even superficial support to their position. *Exxon* does not authorize States to "discriminate against some, but not all, out-of-state business enterprises by preventing them from controlling in-state facilities" (State Supervisors at 10; see JS at 19); as the Court recognized, the statute there did not discriminate against out-of-state firms at all. 437 U.S. at 125, 126 n.16. Rather, Maryland, to serve a legitimate local purpose, *id.* at 121, 125, legislated against all vertically integrated firms, whether Maryland-based or out-of-state. The fact that all integrated firms were out-of-state firms was truly "incidental" to the legitimate regulatory purpose of the legislation, and non-integrated interstate firms were treated exactly as were Maryland-based non-integrated firms, with the latter afforded "no competitive advantage" over the former. *Id.* at 125-26.

Florida has not sought to exclude Florida firms otherwise similarly situated to Bankers (*i.e.*, Florida-based bank holding companies) from the trust and investment advisory businesses. Florida has acted not against economically *integrated* business but against *interstate* businesses. Discrimination against interstate commerce to confer a competitive advantage on Florida's own business community is the sole purpose and effect of the statutes. *Cf. id.* at 126.[11] They are, as held below, invalid.

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[11] State Supervisors' assertion that the Florida statutory scheme is valid because it permits out-of-state individuals and certain out-of-state corporations to own Florida trust companies and offer investment advisory services in Florida ignores these unavoidable facts and thus could not be farther from the mark (Brief at 11; see also JS at 19). The Commerce Clause is not "satisfied so long as some out-of-state control is possible" (*id.*), particularly when those for whom such "control" is theoretically possible are the least likely to

(footnote continued on following page)

We note, finally, that neither the district court nor Bankers has disagreed with the propositions that the businesses here involved are affected by the public interest, are traditional areas of state regulation, and are undoubtedly subject to Florida's police power—though, as we discuss below, State Supervisors are wrong in saying (Brief at 7, 13) that this case involves state control of banking. Bankers has demanded and the district court has required only that Florida exercise its police power in conformity with the Constitution. That requirement hardly presents an issue for this Court.

II.

Congress Has Not Authorized the States To Discriminate Against the Nonbank Subsidiaries of Out-of-State Bank Holding Companies.

Florida and State Supervisors would have the Court find congressional consent to Florida's patent discrimination against interstate commerce in § 3(d) and § 7 of the Act,

---

be effective competitors; it requires more—an absence of discrimination against interstate commerce, as such, to advantage local economic interests. Florida has bluntly discriminated against commerce by treating functionally identical in-state and out-of-state firms completely differently so as to keep the latter from competing in Florida at all.

State Supervisors also advance the faint argument that, in denying "outlets" within the state to Bankers, Florida has not interrupted the flow of interstate commerce (Brief at 10-11, 14; see also JS at 19). This is frivolous. Florida's action entirely prevents Bankers and other out-of-state bank holding companies from delivering the very personal services involved here to Florida consumers; even the very rich have no desire to fly to New York whenever they want to meet with a trust officers or investment advisor. State Supervisors' attempt to create a commerce clause distinction between the flow of commerce and the operation of retail outlets is baseless; could Florida protect its local merchants from competition by prohibiting the entry of out-of-state supermarkets or department stores?

12 U.S.C. §§ 1842(d), 1846. Section 3(d), which pertains to the formation or acquisition of *banks* by bank holding companies, simply has nothing to do with this case because this case has nothing to do with the formation or acquisition of a bank. Section 7, which merely allows the exercise of otherwise legitimate state authority—at least to the extent not inconsistent with the Act—likewise has no bearing here since the States have no authority under the Constitution to discriminate against interstate commerce for the benefit of local business interests.

STRUCTURE OF THE BANK HOLDING COMPANY ACT. In the Act, Congress has classified the subsidiaries of bank holding companies into two categories: (1) "banks" and (2) all others, *i.e.*, those doing such nonbanking businesses as may be authorized by the Federal Reserve Board, pursuant to the limitations and standards of the Act. Section 3 of the Act regulates the formation and acquisition of "bank" subsidiaries, and § 4 limits and regulates the other, nonbanking, businesses that may be organized or acquired by holding companies. The nonbanking activities sanctioned by § 4 include investment advisory and trust services, as the Federal Reserve Board has by regulation declared. 12 C.F.R. § 225.4(a)(4), (5). Florida and State Supervisors here call upon the Court to rewrite the Act and to eliminate the sharp distinction Congress has thus drawn.

SECTION 3(D). This subsection of § 3 prohibits holding companies from crossing State lines in their ownership of "bank" subsidiaries, unless the State of the bank to be acquired or organized has by statute waived the prohibition. Florida and State Supervisors urge that this narrow state role—to *waive* the restriction of § 3(d)—also includes the power to *extend* it to § 4 activities, so that out-of-state bank holding companies may constitutionally be barred from acquiring or organizing nonbank subsidiaries within the State. This contention is nonsense:

First, the prohibition of § 3(d) applies by its plain language only to holding companies' acquisitions of "banks," a term Congress carefully defines in § 2(c) of the Act as

> "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

Neither Florida nor State Supervisors contend that Bankers seeks to own and operate in Florida a business that would be a "bank" within the meaning of § 2(c); they argue that the term is or should be construed more broadly than Congress, in specific terms, has defined it. This, Florida says, is necessary to close a "loophole." (State Supervisors at 17-18; JS at 10) [12]

The attempt to substitute in § 3(d) a different, and unusual, meaning for the word "bank" than that which is prescribed in the preceding section of the Act does not merely contravene established principles of statutory construction and common sense; it is an effort to have the Court reject Congress' basic statutory plan.

Similarly, State Supervisors' attempt (Brief at 17) to invoke the Court's discussion of "commercial banking" in *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), is remarkable in light of that case's holding: companies that offer some of the "cluster" of services that com-

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[12] State Supervisors also attempt to manipulate legislative history to justify an interpretation of § 3(d) that contrasts sharply with its plain meaning (Brief at 17-18). In fact, the legislative history reinforces the plain meaning by demonstrating that § 3(d) was enacted to eliminate a concern that the general McFadden Act restriction on *bank* branching across state lines would be subverted by multi-state bank holding companies. 102 CONG. REC. 6860 (remarks of Sen. Douglas) (1956); see H.R. REP. No. 609, 84th Cong., 1st Sess. 24 (1955) (discussing § 5(c) of H.R. 6227).

prise "commercial banking"—including "trust administration" and "investment advice"—are not within the line of commerce of "commercial banking" unless they *also* accept demand deposits and make commercial loans, which the Court held to be essential elements of the activity of "commercial banking." 374 U.S. at 356-57 & n.33. The other cases they cite are equally inapposite.[13]

The "loophole" argument is but Florida's way of saying that it disagrees with the policy decision made by Congress to treat differently the banking and nonbanking activities of bank holding companies. The "loophole" is the law.

Second, the attempt to expand the prohibition of § 3(d) to encompass nonbank subsidiaries disregards the language of § 3(d): "no application shall be approved under *this section*"—*i.e.*, § 3, which as noted above governs only the

[13] For example, State Supervisors cite to *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975), in aid of their statement that "Other courts have not construed section 3(d) as narrowly as did the court below" (Brief at 18). The question in *Iowa Independent Bankers* was whether Iowa, acting under § 3(d), could by statute prohibit some but not all out-of-state holding companies from acquiring *banks* within Iowa. The question of non-bank subsidiaries was not present in the case and State Supervisors' attempt to suggest otherwise—indeed, their implication that the court "held" otherwise—is misleading.

Florida's strong reliance on *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,813 (D.C. Cir. 1979) and similar cases (JS at 8-13), is equally unavailing. Those cases decided whether certain *types* of nonbanking activities were so closely related to banking as to be permissible for bank holding companies under § 4, not whether a State may preclude out-of-state holding companies from engaging in activities that in-state holding companies may conduct under both § 4 and applicable state law. The "straw man" issue stressed by Florida—whether the 1970 amendments to the Act liberalized the *types* of activities in which bank holding companies can engage—is irrelevant to this case. The only issue here is the constitutionality of state geographical barriers to admittedly permissible activities—activities permitted by Florida to its own companies.

formation or acquisition of *banks.* Section 4 regulates holding companies' entry into nonbanking ventures such as investment advice and trust administration, and that section contains no restriction comparable to § 3(d).[14]

Third, were § 3(d) not limited to holding companies' acquisitions of "banks" (as defined), its flat prohibition would already operate to prohibit Bankers' proposed Florida operations. If, as Florida and State Supervisors suggest, Congress intended § 3(d) to have that effect, there would be no need for Florida's own legislative prohibitions. The authors of the hasty amendment to § 659.141(1), Florida's legislators and bankers, unmistakably understood what Florida's advocates do not.

SECTION 7. In their faltering effort to demonstrate that Congress intended to sanction Florida's discrimination against interstate commerce, Florida and State Supervisors grasp as well at § 7 of the Act, 12 U.S.C. § 1846. State Supervisors argue in the face of clearly contrary statutory language and legislative history that § 7 constitutes "an affirmative grant of power to burden interstate commerce in an otherwise unconstitutional manner" (Brief at 19).

Again, they are plainly wrong. As the legislative history makes abundantly clear, § 7 was not intended to grant new authority to the States, but only "to *preserve* to the States those powers which they now have in our dual banking system." S. REP. No. 1095 (Part 2), 84th Cong., 2d Sess.

[14] The question of whether § 3 or § 4 governs an application is not, even apart from § 3(d), merely an administrative technicality, since the two sections specify different criteria by which applications are to be judged.

5 (1956) (emphasis added).[15] The plain language of the section unambiguously carries out that purpose:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Thus, the only state legislation permitted by § 7 is that which would have been permitted absent enactment of the Act, *i.e.*, that which passes muster under the Commerce Clause without aid of congressional authorization, which the Florida statutory scheme does not. A section of the Act that merely preserves the otherwise lawful "powers and jurisdiction" of the States over "banks, bank holding companies, and subsidiaries" cannot by mere assertion be transformed into a section that adds substantial new powers of otherwise unconstitutional breadth.

* * *

"This case presents the narrow question of what Congress did, not what it could do." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941). What Congress did here is quite clear; it limited to "banks" the States' power to exclude subsidiaries of bank holding companies. It did not authorize unconstitutional discrimination against interstate commerce in trust and investment advisory services such as Florida seeks to enforce.

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[15] The Senate Report further states with respect to § 7:

> "The intent of the committee was to make it clear that a State could not enact legislation inconsistent with the bill and therefore nullify its effect. . . . [Y]our committee reiterates its view that section 7 in no way permits States to exercise such powers and jurisdiction in a manner inconsistent with this proposed legislation." *Id.*

Conclusion

The decision below fully accords with this Court's controlling decisions under the Commerce Clause. The construction of the Bank Holding Company Act proposed by Florida and State Supervisors is patently wrong. Consequently, Florida has failed to establish that the questions presented are "so substantial" as to warrant plenary consideration, and the motion to affirm should be granted.

Respectfully submitted,

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IN THE

Supreme Court of The United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISRICT OF FLORIDA, TALLAHASSEE DIVISION

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Anno., *Eliqibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary*, 26 A.L.R. 3d 1019 (1969) 23

S.Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 2 (1955), U.S. Code Cong. & Admin. News 1956, 14,26,27,37,38

H.Rep. No. 609, 84th Cong., 2d Sess. (1956) 27

115 Cong. Rec. 32,890 (1969) 31

Hearings on H.R. 6778 Before the House Committee on Banking and Currency, 91st Cong., 1st Sess. 198-199 (1969) 28

S.Rep. No. 1084, 91st Cong., 2d Sess. 12 (1970), U.S. Code Cong. § Admin. News (1970) 29,31

Conference Report, 1970 U.S. Code Cong. & Admin. News, 5566-72 32,34

116 Cong. Rec. 41952, 41961 (1970) 32

116 Cong. Rec. 41963 (1970) 31

116 Cong. Rec. 41,950-51 (1970) 32

116 Cong. Rec. 41,952-53 (1970) 32,33

116 Cong. Rec. 41,953-54 (1970) 33

116 Cong. Rec. 42,424 (1970) 33

IN THE

Supreme Court of The United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR THE APPELLANT

This brief is filed pursuant to Rule 40 of the Rules of this Court. References to the separate Appendix of relevant portions of the Record will be designated as (App.____). References to the Appendix to the Appellant's blue Jurisdictional Statement will be designated as (Blue J.S. App. ____). References to the Appendix attached to this Brief will be designated as (App.____herein).

OPINIONS BELOW

The Order and Opinion of the United States Three Judge District Court for the Northern District of Florida dated December 15, 1978 is reported at 461 F.Supp. 1187 (N.D. Fla. 1978) and is set forth at (Blue J.S. App. Al and B1). The Order and opinion of March 22, 1979, altering and amending the Order of December 15, 1978, is not reported, but is reprinted at (Blue J.S. App. D1 and E1).

JURISDICTION

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a specially constituted three judge court convened pursuant to 28 U.S.C. § 2281 (1970).[1] That Order, as amended, declares unconstitutional an enjoins the enforcement of a portion of Florida Statutes § 659.141(1) (1977); and declares unconstitutional Florida Statutes § 660.10 (1977). Both statutes were found to be violative of Article I § 8, cl. 3 (the Commerce Clause) of the United States Constitution.

The Final Order was made and entered on December 15, 1978. A motion for clarification, reconsideration and to alter and amend judgment was duly filed December 26, 1978. The Order was altered and amended, in part, on

[1] 28 U.S.C. § 2281 (1970) was repealed by Pub.L. 94-381, August 12, 1976, 90 Stat. 1119. However, this repealer was expressly inapplicable to any action commenced on or before August 12, 1976. This action was filed on October 24, 1973, and thus the repealer does not affect the statutory jurisdiction of the Court over this appeal.

March 22, 1979. A protective Notice of Appeal to the United States Court of Appeal for the Fifth Circuit was filed in the district court on April 20, 1979. On May 14, 1979, further proceedings in appeal to the Fifth Circuit were stayed, pending the resolution of any jurisdictional problem in this Court. Notice of Appeal to this Court on behalf of the Appellant was filed on May 11, 1979, in the United States District Court for the Northern District of Florida. Appellant filed his Jurisdictional Statement on July 10, 1979, and on October 1, 1979, this Court "noted probable jurisdiction."

The Supreme Court of the United States has jurisdiction to review the Final Order by direct appeal pursuant to 28 U.S.C. § 1253. *White v. Regester,* 412 U.S. 755, 761 (1973); *Roe v. Wade,* 410 U.S. 113, 123 (1973); *Florida Lime and Avocado Growers v. Jacobsen,* 326 U.S. 73, 80 (1960).

QUESTIONS PRESENTED

The Bank Holding Company Act of 1956, as amended, with certain exceptions, prohibits a bank holding company from directly or indirectly engaging in nonbanking activities. However, a bank holding company, with Federal Reserve Board approval, may engage in certain activities which are deemed "so closely related to banking to be a proper incident thereto." The Act further specifically prohibits bank holding company expansion into banking across state lines, unless specifically authorized by state statute. Florida Statutes § 659.141(1) (1977), in part, specifically prohibits a bank holding company, the operations of which are principally conducted outside of Florida, from directly

or indirectly owning, acquiring or controlling a bank, *trust company or investment advisory business in Florida.* Florida Statutes § 660.10 (1977) prohibits all corporations except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. The questions presented are:

1. Whether the Bank Holding Company of 1956, and as amended, authorizes, recognizes and respects the right of each state to restrict bank holding company expansion across state boundaries, and forbid the entry of out-of-state bank holding companies into banking and certain "closely related" activities, such as trust and investment advisory business, located within its jurisdiction.

2. Whether, as a proper incident of its traditional power to regulate the performance of trust activities, a state may, without violating the "Commerce Clause" of the United States Constitution, restrict such activities to domestic corporations who have obtained a specific charter and certificate of authority to perform trust business.

3. Whether the lower court incorrectly applied the Commerce Clause principles laid down by this Court in *Philadelphia v. New Jersey,* in holding as unconstitutional a portion of Florida Statutes § 659.141(1) (1977) and Florida Statutes § 660.10 (1977).

THE CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. *Article I § 8 Cl. 3 United States Constitution*

Congress shall have power . . . to "regulate commerce . . . among the several states, . . ."

2. Florida Statutes § 659.141 (1977)
(The full text of the statute is set forth in App. A herein.)

3. Florida Statutes § 660.10 (1977)
(The full text of the statute is set forth in App. B herein.)

4. 12 U.S.C. § 1842(d)
(The full text of the statute is set forth in App. C herein.)

5. 12 U.S.C. § 1843(a) and (c) (8)
(The full text of the statute is set forth in App. D herein.)

6. 12 U.S.C. § 1846
(The full text of the statute is set forth in App. E herein.)

7. 12 C.F.R. § 225.4(a)(4) and (5)
(The full text of the regulations is set forth in App. F herein.)

STATEMENT

Appellee, Bankers Trust New York Corporation (hereinafter "BTNYC") is a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.*

(hereinafter the "Act"). BTNYC organized and incorporated a Delaware corporation, Appellee, BT Investment Managers, Inc. (hereinafter "BTIM"), a wholly-owned subsidiary which subsequently qualified to do business in Florida.[2] BTIM was formed for the purpose of engaging in the business of providing investment services, but because it is owned by a bank holding company, it could not engage in such business until such time as it acquired the approval of the Federal Reserve Board.[3]

BTNYC and BTIM applied for such approval in October, 1972. (App. 23). Objections to the application were filed by Fred O. Dickinson, Jr., as Florida Comptroller, defendant, Lewis' predecessor in office, and by the Florida Bankers Association (FBA), amicus curiae below.[4]

At the time the application was filed, Florida Statutes § 659.141(1) (1971) prohibited Appellee, BTNY, an out-of-state holding company, from owning or controlling an investment advisory business in Florida where or from which it furnishes investment advisory services to trust companies or banks in Florida. While the plaintiff's ap-

[2] See Stipulation filed by the parties May 11, 1978. App. 22).

[3] Under Section 4(c)(8) of the 1956 Act, 12 U.S.C. § 1843(c)(8), a bank holding company like BTNYC has to secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto" (App. D herein). The Board has provided by regulation that "acting as an investment or financial advisor" is such an activity. 12 C.F.R. § 225.4(a)(5) (1978) (App. E herein).

[4] Defendant, Gerald A. Lewis, is the incumbent Comptroller of the State of Florida, and was properly substituted as a party defendant.

plication before the Board was pending, the Florida legislature, amended § 659.141(1), effective December 21, 1972, and extended the prohibition to businesses furnishing investment advisory services to any person rather than, theretofore, only to Florida trust companies and banks.

In April, 1973, the Board of Governors of the Federal Reserve System denied the Plaintiff's application, in accordance with *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, (1965), principally because of the prohibition of Florida Statutes § 659.141(1), as amended. 59 Fed. Res. Bull. 364, 367 (1973) (App. 26).[5]

Plaintiffs did not initially appeal the decision of the Board of Governors, but rather filed suit in October, 1973, in federal court attacking the constitutionality of the Florida laws. According to plaintiffs, BTNYC did petition the United States Court of Appeals for the Second Circuit for review of the Order of the Board denying its proposal to act as an investment adviser. Apparently, the petition has been withdrawn with leave of the court to reinstate at the option of BTNYC pending the outcome of the instant litigation.[6]

In October, 1973, plaintiffs filed suit against the Comptroller of the State of Florida, defendant's prede-

[5] In denying the application because of Florida Statute § 659.141(1) the Board specifically relied on Section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney Nat'l Bank v. Bank of New Orleans and Trust Co.*, 379 U.S. 411 (1965).

[6] See Appellees' Brief in Support of Motion to Affirm, at page 10, filed with this Court in August, 1979. The petition was filed November 13, 1973, subsequent to the filing of the instant suit and some six months after the decision of the Federal Reserve Board.

cessor in office, seeking a declaration that Florida Statutes §§ 659.141(1) and 660.10 contravene the United States Constitution.[7] In addition to the investment advisory office, BTNYC is also seeking to establish, through a subsidiary, a *de novo* Florida trust company. Florida Statutes §§ 659.141(1) and 660.10 together prohibit such establishment. It was stipulated by the parties that but for he existence of the challenged statutes, BTNYC would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary, in trust business in Florida.[8]

The cause was originally dismissed by the three judge court on "abstention" grounds, pending interpretation of laws by Florida courts. Plaintiffs originally sought to appeal the dismissal directly to this Court. However, 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court only from "an order granting or denying . . . an interlocutory or permanent injunction. . . ." Since the order merely dismissed the action on the basis of the abstention doctrine, the appeal was improvidently taken, and this Court accordingly declined to take jurisdiction. Upon remand, the three judge court entered a fresh order

[7] The complaint alleges four constitutional grounds upon which the statutes are said to be involved: (1) denial of equal protection; (2) contravention of the Commerce Clause; (3) denial of substantive due process; and (4) violation of the supremacy clause, Article VI, clause 2. Plaintiffs abandoned reliance on the last two of these contentions prior to the final hearing in this case (Blue J.S. App. B25). See 461 F.Supp. at 1191, note 4.

[8] See Stipulation filed May 11, 1978 (App. 22). Trust company business is an activity the Board has determined to be a "closely related" activity to banking to be deemed a proper incident thereto (App. F herein).

from which plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. See *BT Investment Managers, Inc. v. Lewis,* 559 F.2d 950, 953 (5th Cir. 1977)

Upon stipulated facts (App. 22), final hearing was held on September 1, 1978. The three judge federal district court by Final Order, as amended, declared Florida Statutes § 660.10, and a portion of the first sentence of Florida Statutes § 659.141, which prohibits a bank, trust company or holding company, the operations of which are principally conducted outside Florida, from acquiring, owning or controlling a Florida trust company or investment advisory business, unconstitutional as violative of Article I § 8 of the United States Constitution. Defendant was permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977).[9] The district court did not grant injunctive relief as to Florida Statutes § 660.10 (1977), stating, at 461 F. Supp. at 1201,

> Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring enforcement of Florida Statutes

[9] The court originally declared the entire first sentence of § 659.141(1) unconstitutional. However, by Order dated March 22, 1979, the court amended the original Order limiting its declaration to that portion of the sentence dealing with investment advisory services and trust services. (Blue J.S. App. D1 and E1). Thus the final decision did not address the constitutionality of that portion of § 659.141(1) which governs acquisition of Florida banks by out-of-state banks, bank holding companies or trust companies.

§ 660.10 would be premature, and therefore inappropriate, at this time.

The court held that both Florida laws were *per se* unconstitutional in contravention of the Commerce Clause, relying on *Philadelphia v. New Jersey* 437 U.S. 617 (1978).[10] The court specifically found that: (1) § 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market; and (2) § 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. 461 F.Supp. at 1196. The court, in rejecting defendant's arguments, specifically held that § 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), applied only to state laws governing holding company acquisition of banks and did not cover laws governing acquisition of trust services, investment advisory services or other activities "closely related" to banking. 461 F.Supp. at 1199.

The court further held that § 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), Reservation of Rights to States, merely,

> . . . assure(s) that the states will not be deemed dispossessed of whatever regulation authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act. In no wise does it pass on to the states the power to adopt regulations on any subject which would otherwise be contrary to the commerce clause. 461 F.Supp at 1199.

[10] Having determined that the subject statutes offend the Commerce Clause, the court expressed no opinion as to the validity or invalidity of the statutes under any other constitutional theory proffered by plaintiffs. See 461 F.Supp. at 1191. It should also be noted that both Florida Statutes § 660.10 and Florida Statutes § 659.141 are affected by the Florida Regulatory Reform Act of 1976, Florida Laws 1976, ch. 760178, Florida Statutes § 11.61, and are slated to be repealed effective July 1, 1980, unless the legislature decides prior to January 1, 1980, to retain them. See 461 F.Supp. at 1191, note 3.

SUMMARY

Point I. The Bank Holding Company Act of 1956, and as amended, authorizes, recognizes and respects the right of each state to restrict bank holding company expansion across state boundaries, and forbid the entry of outside bank holding companies into banking and certain "closely related" activities located within its jurisdiction.

A. The express grant of authority to the states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a bank in a particular state, 12 U.S.C. § 1842(d) of the Bank Holding Company Act of 1956, necessarily includes an implied grant of authority to prohibit or exclude entry into certain activities "clasely related" to banking, *i.e.* investment advisory and trust business. This premise is based on the original congressional intent of the enactment of the 1956 Act. It was not changed after the 1970 Amendments to the Act.

The primary objective of the Act was to prevent the undue concentration of economic power in bank holding companies. Consistent with this objection, the Act generally prohibited a bank holding company from acquiring any nonbanking company. Section 4(a) of the 1956 Act, 12 U.S.C. § 1843(a)(1). However, bank holding com-

panies were permitted to conduct certain activities which were "financial, fiduciary or insurance in nature" which the Board of Governors determined to be "so closely related to the business of banking as to be a proper incident thereto." 12 U.S.C. § 1843(c)(6) (1964), as amended, 12 U.S.C. § 1843(c)(8) (Supp. V, 1965-69).

The Board of Governors restrictively interpreted the "closely related" test as prohibiting affiliation with any company whose activities were not "directly and significantly connected" to the banking operations that the particular holding company was already engaged in. See *Transamerica Corp.*, 1957 Fed. Res. Bull. 1014.

Since § 1842(d) specifically prohibited bank holding company expansion across state lines into banking, it also prohibited expansion across state lines into activities which were "financial, fiduciary or insurance in nature." This is so because any proposed subsidiary geographically removed from the bank holding company's banking subsidiary would not be "directly and significantly" connected to the "business of banking." However, under this test, it would also restrict bank holding expansion within a particular state, if the proposed nonbanking activity was graphically removed from the bank subsidiaries' operations. This result is surely consistent with the general intent and purpose behind the 1956 Act.

The crucial inquiry now becomes whether the 1970 Amendments to the Act change or alter these concepts. Contrary to the conclusion of the district court, the 1970 Amendments neither changed the original intent of the 1956 Act, nor liberalized or expanded the range of business

activities in which bank holding companies could engage. *Alabama Ass'n of Ins. Agents v. Board of Governors*, 533 F.2d 224, 231 (5th Cir. 1976).

The most significant amendment was the elimination of the one-bank holding company loophole, which had been previously exempt under the 1956 Act. After a fierce legislative battle over § 1843(c)(8), this section was amended to read "closely related to banking," instead of "closely related to the business of banking." Of significance is the retention of the "closely related" language and rejection of the "functionally related" language, which had been suggested by those favoring expansion of bank holding companies. The change of the phrase "the business of banking" may have somewhat removed the geographic restriction on expansion within a state, but it would be inconsistent with the congressional intent behind the amendment to conclude that it affected any restrictions on expansion across state lines.

Because the 1970 Amendments did not affect the original intent of the 1956 Act—to prevent the concentration of economic power by bank holding companies—it is quite consistent to conclude that the state's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities.

B. In addition, defendant submits that 12 U.S.C. § 1846, Reservation of Rights to States, authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into "closely related" activities located within its boundaries. The lan-

guage of § 1846 specifically refers to state powers and jurisdiction with respect to bank holding companies and their subsidiaries.

Legislative history clearly shows that the section preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under the 1956 Act. S.Rep. No. 1095, pt. 1, 84th Cong. 1st Sess., 2, (1955), U.S. Code Cong. & Adm. News 1956, pp. 2482, 2492, 2504. The legislative history, together with judicial interpretations of § 1846, confirm that the section preserves to the states, the broad power sufficient to bar bank holding companies or their subsidiaries from extending their domains. *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 419, 424, 428, 430 (1956).

In *Whitney, supra*, this Court found that the Federal Reserve Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company would be prohibited by a valid state law.

Similarly, the Fifth Circuit Court of Appeals recognized the importance of state legislation prohibiting or limiting a bank holding company's expansion into "closely related activities," pursuant to 12 U.S.C. § 1843(c)(8). *Florida Ass'n of Ins. Agents v. Board of Governors*, 519 F.2d 334, 342 (5th Cir. 1979). In applying the principles announced in *Whitney, supra*, the court found that the Board of Governors cannot ignore the applicability and

effect of state law inasmuch as it bears upon the "public interest" determination required by 12 U.S.C. § 1843(c)(8). Section 1843(c)(8) requires a two-tiered determination before the Board can approve a proposal to expand into "closely related" activities. First, the activity must clearly be "closely related" to banking. Second, and more importantly, the proposal must meet the "public benefits" test. A crucial determining factor to consider under this later test is whether the proposal violates state law. If so, then approval is necessarily precluded because "it would hardly be consistent with the public interest to approve a plan which violates state law."

Consequently, it is § 1846, authorizing, recognizing and respecting a state's right to bar bank holding company expansion, which necessarily requires the Board to consider and follow state law in determining a proposal to engage in a "closely related" activity under § 1843(c)(8).

In conclusion, 12 U.S.C. §§ 1842(d) and 1846, together and apart from each other, sufficiently authorize state legislation such as enacted in Florida. Since these federal statutes very clearly guarantee to the states the power to absolutely exclude bank holding companies principally operating outside of a state from acquiring in-state banks, they must also have been intended to guarantee th states the power to exclude those same holding companies from the performance of services "so closely related to banking . . . as to be a proper incident thereto." There is no indication that Congress intended to limit the regulatory power of the states when it amended the Bank Holding Company Act to permit bank holding companies to engage in "closely related" activities. The judicial creation of such a loophole would result in foreign holding companies being able to expand their operation into states

in the face of a clear congressional mandate giving the states the right to exclude those holding companies. The effect of such a loophole would be to circumvent the power expressly reserved to the States to regulate banking functions within their boundaries.

Point II. As a proper incident of its traditional police power to regulate the performance of trust activities, a state may, without violating the Commerce Clause, restrict such activities to domestic corportions who have obtained a specific charter and certificate of authority to perform trust business.

Florida Statutes § 660.10 (1977), stricken by the district court as violative of the Commerce Clause, prohibits all corporations, except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. It has been the governing law of Florida for over 50 years, and is similar to statutes enacted in other jurisdictions for similarly lengthy periods. The statute clearly governs an area of traditional state concern.

In holding § 660.10 as violative of the Commerce Clause, the district court failed to consider it in its proper context. Plaintiffs' primary focus in this litigation is Florida Statutes § 659.141(1) (1977), which prohibits a bank holding company, whose operations are principally conducted outside of Florida, from owning or controlling a Florida trust company or investment advisory business. Section 660.10 is attacked only insofar as it compliments § 659.141(1). Ownership, acquisition or control of a corporation seeking to do Florida trust business is completely

irrelevant in § 660.10. Consequently, the statute, by itself, would not prohibit plaintiffs from establishing a Florida corporation to perform trust business. Thus the district court has gone too far in casually declaring the statute unconstitutional.

In addition, the district court incorrectly applied Commerce Clause principles in striking § 660.10. The court boldly, and we submit erroneously, concludes that the statute facially discriminates against out-of-state businesses, to the detriment of interstate commerce, for the protection of local trust business. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To the contrary, § 660.10 prohibits not only out-of-state corporations from performing certain fiduciary activities, it prohibits all corporations, foreign and domestic, except Florida corporations who have been specifically chartered as trust companies and national banks located in Florida, with specific trust powers.

Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida as a trust company. Out-of-state individuals are free to organize and own a trust company in Florida. And apart from § 659.141(1), an out-of-state corporation could establish a Florida subsidiary trust company to engage in trust activities and compete with other Florida trust companies and banks having trust powers.

If § 660.10 discriminates in any way, it is not against any particular segment of commerce, but rather against a particular way of doing business. As the statute is neutral with respect to interstate commerce and is applied evenhandedly, it does not violate the Commerce Clause *per se*,

Exxon v. Governor of Maryland, 437 U.S. 117, 125-129 (1978); *Detroit Automotive Purchasing Service, Inc. v. Lee*, 463 F.Supp. 954, 961-964 (D.C. Md. 1978).

Furthermore § 660.10 does not burden the flow of commerce. The statute is directed, not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. In the instant case, plaintiffs have failed to show that § 660.10 burdens the flow of commerce. Indeed, the only burden plaintiffs can demonstrate is that § 660.10 requires them to form a Florida subsidiary to perform trust business. However, a regulation or prohibition which peculiarly burdens a firm in interstate commerce, need not affect interstate commerce generally, for the Commerce Clause protects the interstate market, not particular interstate firms. *Exxon, supra*, 437 U.S. 117, 125-129.

In addition, there is no Commerce Clause impediment by requiring a foreign corporation to obtain a charter to do business in a particular state. *Railway Express v. Commonwealth of Virginia*, 282 U.S. 400, 444 (1931). The effect of § 660.10 is not discriminatory, but rather it is a reasonable and permissible manner of regulation of fiduciary activities, an area of traditional state concern. The states traditionally, historically and expressly been left by Congress with wide latitude in regulating trust business.

Defendant respectively submits that Florida Statutes § 660.10 should not have been casually stricken as violative of the Commerce Clause. It has been the law of Florida for over 50 years, consistent with the federal dual system of regulation of financial institutions. The district court's

ruling, if allowed to stand, would indeed have a significant impact on not only Florida, but many states with similar legislation.

Point III. The district court incorrectly applied the Commerce Clause principles established in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) in holding as unconstitutional a portion of Florida Statutes § 659.141(1) (1977) and Florida Statutes § 660.10 (1977).

The New Jersey legislation subject to attack clearly demonstrated an attempt to "slow or freeze the flow of commerce for protectionist reasons," by "erecting a barrier against the movement of interstate trade" [refuse], "to isolate the state from a problem common to many," [conservation of the State's remaining landfill space]. Thus, the New Jersey law fell squarely within the area that the Commerce Clause puts off limits to state regulation. There was no reason, apart from their origin to treat the waste differently.

In contrast, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operations of which are principally conducted outside this state," may not control banking businesses or closely related activities in the state. A foreign corporation whose operations were principally conducted in Florida could control a bank, trust company or investment advisory business. Conversly, a domestically incorporated business which had its principal operations outside the state would feel the same effect on the prohibition. The burden thus falls equally on foreign and domestic businesses alike.

Nor has § 659.141(1) "overtly moved to slow or freeze the flow of commerce." To the contrary, it only limits, but does not exclude out-of-state ownership of investment advisory offices. The limitations imposed are directed only to banks, bank holding companies and trust companies, the operations of which are principally conducted outside of Florida. The discrimination, if any, is not directed toward ownership or origin, as was the case in *Philadelphia, supra.*

A regulation or prohibition which peculiarly burdens a firm in interstate commerce need have no restrictive effect on other interstate businesses or on interstate commerce generally. The Commerce Clause protects the interstate market, not particular interestate firms. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Absent same showing that the Florida laws inhibits the flow of goods or services in interstate commerce, the Commerce Clause does not compel the state to justify its action even though the laws may affect certain businesses or business practices in interstate commerce or alter the "structure" of the interstate market.

Fundamentally, one must also distinguish between the regulation of financial institutions and regulations of other more commonly known "articles" or services which may affect interstate commerce. Banking and trust involve matters of public trust and peculiar fiduciary responsibilities and have a significant impact on local and national affairs. The very nature of financial institutions themselves thus may require some burden on interstate commerce. To this extent, these distinguishing characteristics must be

considered in viewing banking and banking related legislation which are subjected to Commerce Clause attack.

Even if both Florida laws impermissibly burden interstate commerce, Congress, under its power over interstate commerce, has affirmatively consented to Florida's prohibition on the entry of foreign based bank holding companies and their subsidiaries into Florida. Such consent legitimately approves statutes by the states that may otherwise violate the Commerce Clause. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

The district court, in rejecting this contention of congressional consent, misconstrues not only the scope of § 1842(d), but also the congressional intent and effect of the 1970 Amendments to the 1956 Act (Point I-A).

Prior to the 1970 Amendments, § 1842(d), in conjunction with 12 U.S.C. § 1843(c)(8), prohibited bank holding company expansion across state lines into "closely related" activities. Furthermore, the 1970 Amendments to § 1843(c)(8), retaining the "closely related" language and adding the "public benefits" test, did not alter this prohibition. The court similarly misconstrues the scope and intent of § 1846. It too prohibits bank holding company expansion across state lines into "closely related" activities. (Point II).

In conclusion, Florida Statutes §§ 659.141(1) and § 660.10 to the extent that it compliments § 659.141(1), express congressional policy allowing the states to have broad jurisdiction over interstate acquisitions within state boundaries by bank holding companies. The statutes do

not discriminate between state and federal banking institutions. Furthermore, the principal objective of the federal Bank Holding Company Act was to prevent concentration of economic power. The Florida laws are consistent with that policy. Through 12 U.S.C. §§ 1842(d) and 1846, Congress has given strength to the principle of competitive equality, and has enabled the states to regulate the concentration of economic power in bank holding companies through legislation at the local level. This Court should therefore reject the district court's holding that the Florida laws violate the Commerce Clause.

ARGUMENT

This case presents a variation on a recurring theme in modern banking law: the tension between federal regulatory statutes designed in part to limit bank activities, and attempts by banks and bank holding companies—often sanctioned by federal banking authorities—to compete in broader lines of business.[11] At issue is the right of each state to restrict or prohibit bank holding company expansion across state boundaries in banking related activities. Necessarily, the questions presented impact the important area of the federal-state dual banking system, the impact of which will reach not only state but national concerns. The case represents the first judicial decision, in the authors' knowledge, directly ruling on the constitutionality of state statues restricting or prohibiting bank holding company expansion across state lines in areas of investment

[11] See *Investment Company Institute v. Board of Governors of the Federal Reserve*, ____F.2d____, Case No. 77-1862, Slip Opinion 10, (D.C. Cir March 30, 1979), *amended* by Order dated July 13, 1979.

advisory services and trust business, activities deemed "closely related to banking" by the Federal Reserve Board. Of necessity, the district court below based its decision upon its interpretation of the congressional intent and purpose behind the enactment of the Bank Holding Company Act 1956, and the 1970 Amendments thereto.

In addition, the case touches upon an area of traditional state concern—the regulation of fiduciary activities within its borders. In question is the right of a state to bar a foreign corporation from doing trust business within its boundaries. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries.[12]

Finally, in holding Florida Statutes §§ 660.10 and a portion of 659.141(1) (1977) *per se* unconstitutional as violative of the Commerce Clause, the district court misapplied the principles laid down by this Court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The defendant respectively submits that the district court below erred in its interpretation of the intent and

[12] See 1 *Scott on Trusts* § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary*, 26 A.L.R. 3d 1019 (1969). For examples of decisions applying such exclusionary statutes, see *Farmers' Loan and Trust Co. v. Smith*, 74 Comm. 625, 51 A. 609 (1902); *Re Avery's Estate*, 45 Misc. 529, 92 NYS 974 (1904); *Gould v. Board of Home Missions*, 167 N.W. 777 (Neb. 1918). In question also is the right of a state to bar a foreign corporation from doing business within its boundaries as recognized in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19, L.Ed. 357 (1869).

scope of the Bank Holding Company Act of 1956, as amended. In Point I of this brief we shall show that the Act of 1956, as amended, 12 U.S.C. §§ 1842(d) and 1846, not only recognizes and respects, but also authorizes the right of each state to restrict and forbid bank holding company expansion across state boundaries into banking *and* certain "closely related" activities located within its jurisdiction. In Point II we shall show that, as a proper incident of its traditional police power to regulate the performance of trust activites, a state may, without contravening the Commerce Clause, prohibit all entities, foreign and domestic, from engaging in certain trust business without acquiring a specific Florida charter and certificate of authority to perform trust business. In Point III, we shall show that the district court, in holding the subject Florida laws unconstitutional, incorrectly applied the Commerce Clause principles laid down in *Philadelphia v. New Jersey*, 437 U.S. 617.

I

THE BANK HOLDING COMPANY ACT OF 1956, AND AS AMENDED, AUTHORIZES, RECOGNIZES AND RESPECTS THE RIGHT OF EACH STATE TO RESTRICT BANK HOLDING EXPANSION ACROSS STATE BOUNDARIES, AND FORBID THE ENTRY OF OUTSIDE BANK HOLDING COMPANIES INTO BANKING AND CERTAIN "CLOSELY RELATED ACTIVITES" LOCATED WITHIN ITS JURISDICTION

A.

THE EXPRESS GRANT OF AUTHORITY TO THE STATES TO PROHIBIT OR EXCLUDE AN OUT-OF-STATE BANK HOLDING COMPANY FORM OWNING, ACQUIRING OR CONTROLLING A BANK IN A PARTICULAR STATE, 12 U.S.C. § 1842(d), INCLUDES AN IMPLIED GRANT OF AUTHORITY TO PROHIBIT OR EXCLUDE ENTRY INTO CERTAIN ACTIVITIES WHICH ARE DEEMED "CLOSELY RELATED" TO BANKING

In holding a portion of § 659.141(1) and § 660.10 *per se* in contravention of the Commerce Clause,[13] the district court specifically rejected the defendant's contention that Congress through the 1956 Act, as amended, has affirmatively consented to Florida's prohibition on the entry of foreign bank holding companies and their subsidiaries into the state. 461 F.Supp. at 1198-1200. The Douglas Amendment, 12 U.S.C. § 1842(d), prohibits a bank holding company from acquiring an additional bank in any state in which the business of its banking subsidiaries is not principally conducted, unless such state specifically authorizes such acquisition by language to that effect and not merely by implication.[14] The district court reasoned, after considering the 1956 Act, and amendments, that § 1846(d) does not consent to any state's attempt to bar an out-of-state bank holding company from acquiring other companies within the state which are engaged in activities "so closely related to banking or managing or controlling banks as to be a proper incident thereto," within the meaning of 12 U.S.C. § 1843(c)(8). 461 F.Supp. at 1199.

Defendant contends, however, that the ability to prohibit the acquisition of banks within a particular state

[13] Points II and III of Defendant's Brief will further discuss the Commerce Clause issue apart from the Bank Holding Company Act.

[14] See App. C herein.

must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. Otherwise, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. 461 F.Supp. at 1199. This argument is premised on the original congressional purpose behind enactment of the 1956 Act, that being to limit the concentration of economic power in the hands of bank holding companies.[15] However, in rejecting this argument, the district court looked to the 1970 Amendments to the Act and concluded, at 461 F. Supp. 1200,

> . . .[a]lthough defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies), the purpose of the 1970 Amendments run counter to their arguments. The 1970 Amendments permit a bank holding company to obtain 'any company the activities of which . . . are so closely related to banking . . . as to be a proper incident thereto,' and not just companies 'all the activities of which are of a financial, fiduciary, or insurance nature,' as to the act provided prior to 1970. The congressional history of the amendment makes it clear that Congress in 1970 intended to expand the

[15] See *Alabama Ass'n of Ins. Agents v. Board of Governors*, 533 F.2d 224, 231 (5th Cir. 176); on *second petition for rehearing*. 558 F.2d 729 (5th Cir. 1977); *cert. denied* 435 U.S. 904 (1978); See *Board of Governors v. First Lincolnwood Corporation*, ____U.S. ____, 99 S.Ct. 505, 510 (1978); See S.Rep.No. 1095, pt. 1, 84th Cong., 1st Sess., 2 (1955), U.S. Code Cong. & Admin. News 1956, p. 2482.

> range of business activities in which bank holding companies could engage, giving them greater flexibility and latitude. (citations omitted)

This reasoning and interpretation of the Amendments is precisely where the district court not only misconstrues congressional intent, but overlooks other aspects of the 1956 Act. To put matters in proper perspective one must review the development of the Act in light of the Amendments thereto.

In tune with the primary congressional objective to prevent undue concentration of economic power in bank holding companies, the 1956 Act generally prohibited, with certain exceptions, a bank holding company from acquiring direct or indirect ownership or control of "any company which is not a bank." Section 4(a) of the 1956 Act, 12 U.S.C. § 1843(a)(1). However, under the 1956 Act, bank holding companies were permitted to conduct nonbank businesses, all the activities of which were of a "financial, fiduciary or insurance nature" which the Board of Governors of the Federal Reserve determined to be "so closely related to the business of banking as to be a proper incident thereto."[16] The phrase "closely related to the business of banking" was never explicitly elucidated in the legislative history of the original passage in 1956.[17] However, the Board interpreted this language restrictively, judging that it prohibited affiliation with any company

[16] 12 U.S.C. § 1843(c)(6)(1964, as amended, 12 U.S.C. § 1843 (c)(8) (Supp. V, 1965-69)

[17] See S.Rep.No. 1095, 84th Cong., 2d Sess. (1956); H.Rep.No. 609, 84th Cong., 2d Sess. (1956).

whose activities were not "directly and significantly connected" to the banking operations that the particular holding company was already engaged in.[18]

This narrow interpretation must be viewed in light of the Douglas Amendment, 12 U.S.C. § 1842(d) prohibiting bank holding company expansion into banking across state lines. If a bank holding company could not operate a bank subsidiary in another state, either because of an express prohibition of that state or lack of specific authority to do so, expansion into activities of a "financial, fiduciary or insurance nature" in that state would be prohibited because of the lack of a direct and significant connection to any bank subsidiary. In fact, there could be no direct and significant connection because there could be no bank subsidiary. Therefore, defendant submits that prior to the 1970 Amendments to the Act, § 1842(d) would have indirectly prohibited bank holding company expansion across state lines into activities of a "financial, fiduciary or insurance" nature. Any proposed subsidiary geographically removed from the bank holding company's banking subsidiary would simply not be a "direct and significant" connection in view of the Board's interpretation. Viewed in this light, § 1842(d) not only served to restrict expansion across state lines in areas of banking, but also in otherwise allowable activities. Congress did not need to focus on the nonbanking activities of holding companies because the

[18] See *Hearings on H.R. 6778 Before the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 198-199 (1969) (Statement of William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System); see also *National Courier Assoc. v. Board of Governors*, 516 F.2d 1229, 1236 (D.C.Cir. 1975); see *Transamerica Corp.*, 1957 Fed. Reserve Bull. 1014.

Act required them to divest themselves of such subsidiaries except those of a "financial fiduciary or insurance nature" which were "closely related to the business of banking." 12 U.S.C. §§ 1843(a) and (c). The "closely related to the business of banking" restriction effectively prohibited bank holding company expansion across state lines into these otherwise permissible activities. This interpretation is surely consistent with the intent of the 1956 Act—to limit bank holding company expansion and concentration of economic power.

Now we turn to the 1970 Amendments to the 1956 Act. The crucial inquiry is whether the Amendments significantly changed the original intent of the 1956 Act, in relation to § 1842(d).

The most significant amendment was the elimination of the one-bank holding company loophole.[19] Nearly all bank holding companies were brought within the regulatory scheme of the 1956 Act, and thus one-bank holding companies which had been exempt,[20] were prevented from entering businesses not related to banking.

[19] 84 Stat. 1760, as amended, 12 U.S.C. § 1841(a); see S.Rep. No. 91-1084, pp. 2-4 (1970), U.S. Code Cong. & Admin. News 1970, p. 5519; see *Board of Governors v. First Lincolnwood Corp.* ——U.S.——, 99 S.Ct. 505, 512 (1978).

[20] The one bank holding company exemption was not an oversight. Congress did not deem it necessary to include one bank holding companies in the 1956 Act because as long as any given enterprise owned only one bank, it could not expand its banking activities structurally beyond the boundaries of any state.

The most controversial section of the 1970 Amendments is section 103,[21] amending § 1843(c)(8), upon which the district court placed great reliance. This section vests discretion in the Federal Reserve Board to decide the permissible activities in which any bank holding company may engage. In order to gain Board approval, the activity must meet two standards: (1) it must be so closely related to banking or managing or controlling banks as to be a proper incident thereto;[22] and (2) the activity must be one that can reasonably be expected to produce benefits to the public—greater convenience, increased competition or gains in efficiency—that outweigh possible adverse effects—undue concentration of resources, decreased or unfair competition, conflicts of interest or unsound banking practices.

The retention of the "closely related" test is highly significant. In an attempt to escape from its past restrictive interpretations of this provision, the Federal Reserve Board and those who favored giving bank holding companies greater latitude, recommended that the phrase "functionally related" be substituted for the "closely related" language of § 1843(c)(8). Initially, both the Senate

[21] Bank Holding Company Amendments of 1970, § 103, 12 U.S.C. § 1843(c)(8) (1970); see comment, *Implementation of the Bank Holding Company Act Admendments of 1970: the Scope of Banking Activities*, 71 Mich. L. Rev. 1970 (1973).

[22] Section 1843(c)(8) previously read, "so closely related to the business of banking."

and House included this new language, although their purposes differed significantly.[23]

The struggle between the two houses culminated in the rewriting of the bill by the Conference Committee "of great controversy and grinding negotiations and many, many offers and counter offers in an attempt to reach agreement."[24] The product was, as one court viewed it, the "type of ambigous compromise that characteristically results when parties who deeply disagree are under intense pressure to reach a mutually acceptable accommodation."[25] Ultimately, the list of prohibited activities was deleted from the Act, in return for a retention of the pre-1970 "closely related" language. The 1956 Act's phrase "the business of banking" was changed to read simply "banking."

[23] The Senate apparently adopted the "functionally related" language to provide the greater flexibility sought by the Board. S.Rep.No. 1084, 91st Cong., 2d Sess. 12 (1970). However, the House included a "negative laundry list" specifically listing certain prohibited activities. 115 Cong. Rec. 32,890 (1969). The House, favoring restricting the nonbank activities of bank holding companies to the standards of the 1956 Act believed that since the House bill was rewritten to include the "laundry list" and other restrictive provisions, an expansive interpretation of the "functionally related" language was precluded, and the deletion of that language was therefore unnecessary. See *e.g. id.* at 32,894 (remarks of Rep. Wright Patman).

[24] 116 Cong.Rec. 41963 (1970) (remarks of Rep. Sullivan).

[25] See *Investment Company Institute v. Board of Governors, supra*, slip opinion 29, ____F.2d____, Case No. 77-1862 (D.C. Cir. March 30, 1979). For a detailed discussion of the events leading up to the final language, see Legislative note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200, 1219-1223 (1971); Chase, *The Emerging Financial Conglomerate; Liberalization of the Bank Holding Company Act*, 60 Geo. L. J. 1225, 1237-1239 (1972).

Although the conferees agreed upon the language of the new section, they differed sharply in their interpretation. Four of the seven House conferees emerged to state that the resulting legislation should "be construed to mean that the Congress was not convinced that such expansion and liberalization was justified," Conference Report, 1970 U.S. Code Cong. & Adm. News at 5572, see also 116 Cong. Rec. 41,952, 41,961 (1970) (remarks of Rep. Patman), and that the new section retained "the basic content and the essential test found in the 1956 Act." 116 Cong. Rec. H 11,691 (daily ed., Dec. 15, 1970). Chairman Wright Patman, leading the House managers of the bill, stated that with the insertion of a second test—the "public benefits" test—the new requirements are a more difficult standard than those of the 1956 Act. 116 Cong. Rec. 41,950-51 (1970). He reasoned that the addition of this test to the closely related language required the Federal Reserve Board to use two separate tests in deciding cases under this section.[26] Even if the activity is found by the Board to be closely related to banking, under this view, it must also determine whether it meets the public benefits test. Finally, Chairman Patman stated that the new amendments require a direct connection between the proposed activities and those that banks were already authorized to perform. 116 Cong. Rec. 41,952-53 (1970).

The Senate conferees and the minority House conferees, however, argued that even the compromise bill

[26] See *Alabama Ass'n of Ins. Agents v. Board of Governors, supra,* 533 F.2d at 235, and *Florida Ass'n of Ins. Agents v. Board of Governors,* 591 F.2d 334, 335 (5th Cir. 1979), specifically recognizing this two-prong test: (1) whether the activity is "closely related," and if so, (2) whether it meets the "public benefits" test.

which survived the conference represented a liberalization of the law.[27] They argued that the amendments would free the Board of the restrictions of the 1956 Act and would allow activities to be related to the business of banking generally, rather than continue the concept that such activities must be related to the specific business carried on by the subsidiary banks of the particular holding company involved. 116 Cong. Rec. 41,953-54 (1970) (remarks of Congressman Widnall); 116 Cong. Rec. 42,424 (1970) (remarks of Senator Sparkman). They further argued that "public benefits" should be weighed in conjunction with the determination that a particular activity was closely related to banking and not as an independent criterion of permissible nonbank activities. 116 Cong. Rec. § 20,640 (daily ed. Dec. 18, 1970).

Courts have disagreed as to implications of the 1970 Amendments, and as to congressional intent and purpose behind them. Compare *National Courier Association v. Board of Governors,* 516 F.2d 1229, 1236 (D.C. Cir. 1975), and *Investment Company Institute v. Board of Governors,* ____F.2d____, Case No. 77-1862 (D.C. Cir., March 30, 1979), at page 32 of slip opinion, with *Alabama Ass'n of Ins. Agents v. Board of Governors, supra,* 533 F.2d 224, at 238-239. The Fifth Circuit in *Alabama Ass'n of Ins. Agents,* at 239, specifically rejected any contention that Congress intended to expand the Board's latitude in substantial degree. The court did note that the deletion of the requirement that the nonbanking activity be of a "financial,

[27] 116 Cong. Rec. 41952-53 (remarks of Rep. Widnall; *id.* 42422, 42424 (remarks of Sen. Sparkman); *id.* 42431 (remarks of Sen. Bennett).

fiduciary, or insurance nature" and that it relate to the "business of banking", represented, at best, a modest broadening of the Board's discretion. However, the court went on to say, at 239,

> Any liberalization of the standards affected by these *minor* wording changes was largely *if not wholly* offset by the Conference Committee's rejection of the "functionally related standard" and the addition of the public benefits test. (E.S.)

The court, at footnote 15 at p. 238-239, did note that the deletion of "business of banking" was primarily sought by the Board,

> . . . to make it clear that nonbanking activities need not relate to the particular banking business of the applicant but to banking in general, thus permitting activities in areas geographically removed from the applicant's bank operations. See Conference Report, 1970 U.S. Code Cong. & Admin. News, pp. 5566-67.

As explained by the Conference Report, any attempt to attach great significance to the deletion of the "financial, fiduciary or insurance" language would be inconsistent with the legislative history which clearly indicates that Congress intended no great significance to be given to this deletion from the present law. *Id.* p. 5566. The Report also noted, at p. 5572, that the elimination of the term "the business of" should be interpreted to mean that there must be a direct and significant connection between the proposed activities and the kinds of activities that banks

generally now carry on, *i.e.* closely related to banking in general.

This last statement would seem to reflect a relaxation of the former requirement that there must be a relationship between the particular activities of the company proposed to be acquired and the business of the particular bank holding company. However, here is certainly nothing in the legislative history to suggest that any relaxation of geographic restrictions, (permitting activities in areas geographically removed from a bank holding company's bank operations), necessarily affect restrictions on expansion *across* state boundaries.

At best, the deletion of the phrase, "the business of banking" may have removed, to a limited degree, certain geographic restrictions as to a bank holding company's expansion within a state. However, in the context of § 1842(d), it would seem incongruous to interpret the amendment so expansively as to allow bank holding company expansion across state lines, when such was impermissible under the 1956 Act.

Indeed, § 1842(d) was not even discussed during the intensly debated legislative developments of the 1970 Amendments. Nor should it have been. Congress, wishing to limit the concentration of economic power in the hands of bank holding companies, expressly prohibited bank holding company bank expansion across state lines, 12 U.S.C. 1842(d), and prohibited entry into nonbanking areas except as to "closely related" businesses. 12 U.S.C. § 1843(a). The 1970 Amendments did not dilute either

of these concepts, contrary to the conclusion of the district court below.[28]

Because the 1970 Amendments did not affect the original intent of the 1956 Act—to prevent the concentration of financial power by bank holding companies—it is quite consistent to conclude that the state's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. To hold otherwise would allow a bank holding company to do indirectly what it could not do directly.

In addition, defendant respectfully submits that 12 U.S.C. § 1846, Reservation of Rights to States, authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into "closely related" activities located within its boundaries. We shall develop this argument below.

B.

12 U.S.C. § 1846, RESERVATION OF RIGHTS TO THE STATES, AUTHORIZES, RECOGNIZES, AND RESPECTS THE RIGHT OF EACH STATE TO FORBID THE ENTRY OF OUTSIDE BANK HOLDING COMPANIES INTO ACTIVITIES "CLOSELY RELATED" TO BANKING, LOCATED WITHIN ITS BOUNDARIES.

In addition to the argument contained in I-A, above, defendant respectfully submits that 12 U.S.C. § 1846

[28] During enactment of the 1970 amendments, Congress was still deeply concerned that the economy was becoming structured along the lines of the Japanese "Zaibatsu" system, in which economic power was concentrated in a few gigantic power centers. See *Investment Company Institute, supra*, p. 39 of slip opinion and note 67.

authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into activities "closely related" to banking, within its boundaries. 12 U.S.C. § 1846, enacted at the inception of the 1956 Act, provides:

> Reservation of Rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

The legislative history, together with judicial interpretations of § 1846 confirm that the section specifically reserves to the states the broad power sufficient to bar bank holding companies or their subsidiaries from extending their domains.

As discussed in Point I-A above, the original congressional purpose behind enactment of the 1956 Act was to limit the concentration of economic power in the hands of bank holding companies and prevent bank holding companies from entering business not related to banking.[29] Congress recognized that bank holding companies are not evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities.[30] Thus, under the

[29] See note 15, *supra*.

[30] See S.Rep. No. 1095, pt. 1, 84th Cong. 1st Sess., 2, (1955), U.S. Code Cong. & Admin. News 1956, p. 2482.

Act, the growth of bank holding companies in the banking field would be regulated but not prohibited.[31]

However, at the same time, Congress expressly preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under the Act. 12 U.S.C. § 1846. Under such a grant of authority, each state may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) the Act empowers the federal authorities to be, or (2) such federal authorities actually are in their administration of the provisions of the Act.[32]

Of significance, as indicated in the language of the Section itself, Congress makes clear that there is a reservation of the rights of any state for the exercise of present and future powers with respect to not only banks and bank holding companies, but also their subsidiaries. As indicated in the legislative history, Congress, by enactment of § 1846, not only recognized but also granted the authority for a state to exercise these powers in a manner more restrictive than the provisions of the Act. See note 30.

Courts have consistently recognized and construed § 1846 as granting this broad power to the states, *Whitney*

[31] *Id.* pp. 2484, 2492.

[32] *Id.*, pp. 2492, 2504.

National Bank v. Bank of New Orleans,[33] 379 U.S. 411, 419, 424, 428, 430 (1956); *related case, Whitney National Bank v. James,* 189 So.2d 430, 441, 442 (C.A. La. 1966), *affirmed* 191 So.2d 140 (La. 1966); *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1291, 1296, (D.C. Cir. 1975), *cert. denied,* 423 U.S. 875 (1975); *Braeburn Securities Corp. v. Smith,* 15 Ill. 2d 55, 153 N.E. 2d 806, 810, (Ill. 1958), *appeal dismissed,* 359 U.S. 311 (1959); A.2d 236 (N.H. 1959); *Florida Ass'n of Ins. Agents v. Board of Governors,* 591 F.2d 334, 342, (5th Cir. 1979).

To date, most judicial decisions construing or discussing § 1846, have concerned state legislation designed in large part to prohibit the formation of bank holding companies, or to restrict entry into state banking.

In *Whitney National Bank v. Bank of New Orleans, supra,* at 419, this Court found that the Federal Reserve Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company would be prohibited by a valid state law.[34]

In *Opinion of the Justices,* 151 A.2d 136 (N.H. 1959), it was held that the legislature of New Hampshire could

[33] Mr. Justice Douglas, in his dissent as to the jurisdictional holding, noted, at 428, ". . . § 1846 specifically reserves to the States a broad power seemingly sufficient to bar bank holding companies or their subsidiaries from extending their domains."

[34] Indeed, the Board, in the instant case, denied the plaintiffs' application on the fact that the proposal would be prohibited by State law. See also *Trans-Nebraska Co.,* 49 Fed Res. Bull. 633, 638 (1963).

prohibit bank holding companies from doing business in the state and prohibit the formation in New Hampshire of bank holding companies because "the business of banking bears such a relation to the economic security of the public that it is a proper subject of regulation by the state in the exercise of its police power." *Id.* at 238. See *Braeburn Securities Corporation v. Smith, supra,* 153 N.E. 806, holding that the state interest in prohibiting branch banking permitted the Illinois legislature to ban the use of bank holding companies with the state, while exempting previously existing bank holding companies so as to not require divestiture of existing holdings.[35]

However, a recent decision by the Fifth Circuit Court of Appeals has noted the importance of state legislation as it affects bank holding company expansion into "closely related" activities.

In *Florida Ass'n of Ins. Agents v. Board of Governors, supra,* 591 F.2d 334, the Fifth Circuit construed § 1846 and § 1843(c)(8) in relation to applications of three bank holding companies to engage in "closely related" activities of the insurance business.[36] An administrative law judge

[35] See also *Grandview Bank & Trust Co. v. Board of Governors,* 550 F.2d 415, 419-20 (8th Cir. 1977), *cert. denied,* 434 U.S. 821 (1977).

[36] 12 C.F.R. § 225.4(a)(9) (1976). Certain sections of these regulations were previously struck down in *Alabama Ass'n of Ins. Agents, supra,* 533 F.2d 224. However, the "closely related" test and the validity of § 225.4(a)(9) was not at issue in *Florida Ass'n.* The case involves the second requirement of the 1956 Act, whether the Board has carried out its statutory obligation under 12 U.S.C. § 1843(c)(8) to determine whether the selling of insurance by the applicants meets the public benefits test.

was assigned to conduct a hearing after formal protests were filed. At the time when the hearings were conducted, Florida had by statute diminished the ability of banks and bank holding companies to engage in the insurance business. Florida Statutes § 626.747 (1977). 591 F.2d at 336. The administrative law judge recommended that the applications be approved, subject to certain conditions. *Id.* at 336.

Subsequent to the administrative law judge's decision, but prior to the Board's review thereof, the Florida Legislature passed Florida Statutes § 626.988(2) (1977), which prohibits banking institutions from engaging in insurance agency activities. In its final order approving the proposals, the Board noted the change in Florida law, but felt that it was not obligated to assess carefully whether the new statute altered its determination of net public benefits under section 4(c)(8) of the Act. 591 F.2d at 337.

In reversing and remanding the case back to the Board, the court noted, 591 F.2d at 337,

> To its credit, the Board recognized that the change in Florida law had seriously restricted the range of insurance activities legally open to banks and bank holding companies in Florida. [citing § 1846]. We disagree, however with the Board's view that it was not obligated to assess carefully whether the new statute altered the calculus of net public benefits under section 4(c)(8).

The court concluded that the Board could not follow its mandate under § 1843(c)(8) without considering the effect of a new Florida law as to the public benefits test,

citing *Whitney National Bank, supra.* The court held that this Court's ruling in *Whitney,* explaining the proper role of the Board in making a similar public benefits determination under a companion section of the 1956 Act, §§ 1842 (c)(4) and (5) (1958),[37] [acquisition of a bank], was equally applicable to a determination of the public benefits test under § 1843(c)(8),[38] [engaging in activities "closely related" to banking]. In remanding, the Fifth Circuit further reasoned, 591 F.2d at 342,

> The Court [in *Whitney*] found that the determination as to the 'applicability and effect' of state law on public benefits criteria under the Act is 'the very type of question that Congress envisioned as being resolved in the first instance by the Board.' 379 U.S. at 425, . . . The Court further stated that it *would hardly be consistent with the public interest to approve a plan which violated the law. Id.* at 418-19, . . . The basic principle is clear that the Board cannot ignore the applicability and effect of state law inasmuch as it bears upon the public interest determination required by the Act. 12 U.S.C. § 1843(c)(8). The Board has done so here. (E.S.)

[37] 12 U.S.C. §§ 1842(c)(4) and (5) (1958) directed the Board to consider "the convenience, needs and welfare of the communities and the area concerned" and ". . . whether or not the effect of such acquisition [of shares in a bank by a bank holding company] . . . would be to expand the size or extent of the bank holding company system involved beyond the units consistent with . . . the public interest."

[38] See discussion at p. 30 of this Brief.

It is significant that the Fifth Circuit applied the *Whitney* doctrine to a bank holding company's application to engage in activities "closely related" to banking, as determined by the Board. The court clearly focused on the two-step determinative inquiry for every bank holding company application to engage in nonbanking activities: (1) whether it meets the "closely related" test, and if so, (2) whether it meets the "public benefits" test, § 1843(c)(8).[39] A crucial determining factor for the Board to consider under this "public benefits" test, is whether the proposal violated state law. If so, then approval is necessarily precluded because "it would hardly be consistent with the public interest to approve a plan which violated the law." *Florida Ass'n of Ins. Agents, supra,* 591 F.2d at 342, citing *Whitney, supra,* 379 U.S. at 418-19.

It is § 1846, authorizing, recognizing and respecting a state's right to bar banking holding company expansion, which necessarily requires the Board to consider and follow state law[40] in determining a "closely related" activity proposal under § 1843(c)(8).

Clearly § 1846 enables states to place much greater restrictions on holding companies than would otherwise apply under the 1956 Act, as evidenced by legislative history and judicial decisions discussed above. This grant of authority[41] is sufficient to allow state legislation prohibiting

[39] See note 26, *supra,* at p. 32, and accompanying text.

[40] Indeed, the court in *Florida Ass'n of Ins. Agents, supra,* 591 F.2d at 342, remanded the case to the Board, instructing it, in part, to require the applicants to amend their proposals in a manner consistent with Florida law.

[41] See note 32, *supra,* at p. 38, and accompanying text.

formation of bank holding companies and their subsidiaries. Lesser bans, such as those in the subject Florida Statutes on certain types of holding companies and services, should also fall within the terms of § 1846. To hold otherwise, contravenes the express congressional intent, authorizing, recognizing and respecting a State's right to restrictively regulate or prohibit bank holding compan expansion.

Therefore, the district court clearly misconstrues § 1846 when it concludes that the language of that section "accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act." 461 F.Supp. at 1199.[42] To the contrary, the Act specifically speaks of terms of "such powers and jurisdiction which it now has or may hereafter have." (App. E herein). By setting the lower limits of restrictions on bank holding companies and enacting § 1846, Congress has allowed States to set higher limits, including outright bans.[43]

[42] In Point III of this Brief, defendant will fully discuss the district court's conclusion that § 1846 does not pass on to the States the power to adopt regulations which may otherwise be contrary to the Commerce Clause.

[43] See Jessee and Seelig, *Bank Holding Companies and the Public Interest*, at 140 (Lexington Books ed. 1977) noting, . . . Section 7 of the Bank Holding Company Act [12 U.S.C. § 1846] recognizes the right of each state to forbid the entry of outside bank holding companies into nonbanking activities located within its jurisdiction. The cast majority of the states do permit such entry. Accordingly, the most limiting restriction on nonbank expansion arises from the act's requirement that any proposed nonbank endeavor be closely related to banking and yield benefits to the public that outweigh possible adverse effects.

II

AS A PROPER INCIDENT OF ITS TRADITIONAL POLICE POWER TO REGULATE THE PERFORMANCE OF TRUST ACTIVITIES, A STATE MAY, WITHOUT VIOLATING THE "COMMERCE CLAUSE" OF THE UNITED STATES CONSTITUTION, RESTRICT SUCH ACTIVITIES TO DOMESTIC CORPORATIONS THAT HAVE OBTAINED A SPECIFIC CHARTER AND CERTIFICATE OF AUTHORITY TO PERFORM TRUST BUSINESS.

Florida Statutes § 660.10 (1977) prohibits all corporations, except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. These activities basically relate to acting as (1) executor or administrator of an estate, (2) guardian of a person, (3) trustee under a testamentary instrument, (4) trustee of real estate, and (5) trustee under a deed of trust. (App. B herein).

It has been the governing law of Florida for over 50 years,[44] and is similar to statutes enacted in other juris-

[44] This statute has been on the books in essentially its present form since 1937. See 1937 Ch. 18399, Laws of Florida, Acts of 1937. Predecessor statutes going back to at least 1923 barred foreign corporations from exercising trust powers in this State. Chapter 8531, Acts of 1921, as amended by Chapter 9287, Acts of 1923. See also *Taylor v. Toledo Trust Co.*, 160 So. 366 (Fla. 1935).

dictions for similarly lengthy periods. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries.[45]

The Florida statute clearly governs an area traditionally regulated by the states. See *Blaney v. Florida Nat. Bank*, 357 F.2d 27 (5th Cir. 1966). By striking § 660.10, as unconstitutional, the district court places this entire area in doubt.

In holding § 660.10 as violative of the Commerce Clause, the district court failed to consider it in its proper context. Plaintiffs' attack on the law can only be viewed in conjunction with § 659.141(1). The focus is clearly on § 659.141(1), and § 660.10 is attacked only insofar as it compliments § 659.141(1). See *BT Investment v. Lewis*, 559 F.2d 950, 955, note 28, (5th Cir. 1977). Ownership, acquisition and control of a corporation seeking to do Florida trust business is irrelevant in § 660.10. Therefore, the statute itself would not have prohibited BTNYC from doing the very thing it seeks to do, *i.e.* establish a *de novo* Florida corporation to perform trust business. It is only in connection with § 659.141(1),[46] that such activity is prohibited; and then only because BTNYC is a bank holding company whose operations are principally conducted outside of Florida. Thus the district court has gone too far in declaring § 660.10 unconstitutional. This shall appear even more evident as the district court's decision is analyzed in light of Commerce Clause principles.

[45] See note 12, *supra*, at p. 23.

[46] Defendant will specifically discuss the Commerce Clause in conjunction with § 659.141(1) in Point III of this Biref, p. 53.

Although the Commerce Clause grants Congress the authority "to regulate Commerce . . . among the several states," it has long been understood that in the absence of conflicting federal legislation on a subject of potential regulation, the states retain a "residuum of power" to adopt their own regulations concerning that subject. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945); *BT Investment v. Lewis*, 461 F.Supp. at 1195. However, in the absence of a conflicting federal statute, this Court has construed the Commerce Clause as a restriction on permissible state regulation. See *Hughes v. Oklahoma*, ____U.S.____, 99 S.Ct. 1727, 1731 and note 3 (1979).

If a statute facially discriminates against out-of-state businesses or which protects and promotes local firms to the detriment of interstate commerce (simple economic protectionism), then it is unconstitutional without any further consideration. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The district court, in striking § 660.10 found that the statute evidenced "simple economic protectionism," and therefore was *per se* invalid. 461 F.Supp. at 1196. To this extent, the district court misconstrued § 660.10 and its effect on interstate commerce.

In holding § 660.10 as a "basically protectionist measure," the district court found that "Section 660.10 . . . cordons off Florida trust companies from competition by out-of-state concerns." 461 F.Supp. at 1196. To the contrary, § 660.10 prohibits not only out-of-state corporations from performing certain fiduciary activities, it prohibits all corporations, foreign and domestic, except Florida trust companies with trust powers and national banks located in

Florida with specific trust powers. Apart from the prohibition of § 659.141(1), § 660.10 does not prohibit foreign corporations from competing, through a Florida subsidiary, with Florida trust companies or Florida banks having trust powers.

Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida, and obtain trust powers. Trust powers can only be obtained through licensing and chartering provisions of Florida Statutes § 659.05 (1977), after the Department of Banking and Finance finds that the proposed trust company has complied in good faith with all the requirements of law. Therefore, § 660.10, apart from § 659.141(1), does not "cordon off Florida trust companies from competition by out-of-state concerns." It merely requires an out-of-state entity to establish a Florida subsidiary corporation and obtain a Florida trust charter, if it wants to engage in trust activities in Florida.

These trust licensing requirements and § 660.10 are neutral in their effect on business, both within and without Florida. Nothing in this requirement either discriminates against out-of-state businesses or protects local interests. If § 660.10 discriminates in any way, it is not against any particular segment of commerce, but rather against a particular way of doing business. As the challenged statute is neutral with respect to interstate commerce and is applied evenhandedly with regard to all segments of commerce, the statute does not violate the Commerce Clause *per se*. See *Exxon v. Governor of Maryland*, 437 U.S. 117, 125-129 (1978); *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F.Supp. 954, 961-964 (D.C. Md. 1978).[47]

Having demonstrated that § 660.10 does not *per se* violate the Commerce Clause, the next critical inquiry is whether the statute burdens the flow of commerce. This determination is critical, because until plaintiffs demonstrate some burden on interstate commerce, even the *Pike* test does not apply.[48] This test is as follows:

> "Where the statute regulates evenhandedly to effectuate a ligitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities." 397 U.S. at 142

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[47] In *Detroit Automotive*, a Maryland statute regulating the sale of automobiles through a comprehensive system of licensing, was held valid under the Commerce Clause on the grounds that the licensing provisions did not discriminate against any particular segment of commerce, but rather against a particular way of doing business. Similarly, if it discriminates at all, it only discriminates against a particular way of doing trust business.

[48] Where legislative objectives are credibly advanced and there is no patent discrimination against to interstate trade, this Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

On the basis of the cases decided after *Pike*, its balancing test currently reflects the law with respect to state interference with interstate commerce in violation of the Commerce Clause. See *Hughes v. Oklahoma*, ____U.S. ____, 99 S. Ct. 1727, 1736 (1979); *Raymond Motor Transportation v. Rice*, 434 U.S. 429, 440-42 (1978); *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-72 (1976). However, in none of the cited cases does the Court proceed without first finding some burden on interstate commerce, however small. Indeed, it is axiomatic that no state provision can be invalidated as offending the Commerce Clause unless there is some demonstrated or apparent nexus between the challenged provision and interstate commerce.

As noted in *Hughes v. Oklahoma, supra*, 99 S.Ct. at 1736, "The burden to show discrimination [against commerce] rests on the party challenging the validity of the statute." In the instant case, plaintiffs have failed to show that § 660.10 burdens the flow of commerce. Indeed, plaintiffs cannot show such burden. Section 660.10 is directed, not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. The only burden plaintiffs can demonstrate is that § 660.10 requires them to form a Florida subsidiary to perform trust business.

While a licensing and chartering requirement may impose some burden on plaintiffs, it does not immediately follow that the statute thereby burdens interstate commerce. A regulation or prohibition which peculiarly burdens a firm in interstate commerce need not affect interstate commerce generally. See *Exxon Corp. v. Governor*

of Maryland, supra, 437 U.S. 117, 125-129. As stated in *Exxon*, at 129, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."

Therefore, § 660.10 does not contravene the Commerce Clause because it does not burden the flow of commerce.

In addition, there is nothing impermissible in the effect of § 660.10. Trust business is primarily local in nature, as evidenced by the very activities enumerated in § 660.10. (App. B). As such, the State of Florida clearly has an important regulatory concern in light of the special nature of fiduciaries activities. In requiring Florida incorporation and specific trust chartering, Florida has merely effected a permissible method of regulation.

There is no constitutional impediment to a state refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business is to be done. *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 400, 444 (1931). In *Railway Express*, this prohibition was sustained on a Commerce Clause attack, as applied to a foreign corporation wishing to carry on within the state on extensive interstate and local express business. See *Atlantic Refining Co. v. Commonwealth of Virginia*, 302 U.S. 22, 26, at note 2 (1937).

The Court, in *Railway*, rejected the Commerce Clause attack, stating, 282 U.S. at 444:

Virginia is not attempting to go beyond its power

> by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would improse a burden on interestate commerce, and it is presumed to be constitutional . . . We may add that . . . the difficulties created by . . . Virginia probably will not prove hard to overcome when it is found that they must be met.

Florida Statutes § 660.10, by analogy, does not "take anything from anybody," nor is Florida "attempting to go beyond its power by indirection." The statute merely refuses to grant any corporation, foreign or domestic, authority to transact local trust business without "taking out a specific trust charter from the jurisdiction within which that business must be done." It is not a discriminatory prohibition or exclusion, but rather a reasonable and permissible manner of regulation of fiduciary activities, an area of traditional state concern.

The Federal Reserve Board, in determining that trust business is an activity "closely related to banking," has specifically recognized a state's authority to regulate the manner in which trust business is performed. Regulation 12 C.F.R. § 225.4(a)(4), (App. F), specifically authorizes trust activities "that may be performed or carried on by a trust company in the manner authorized by Federal or State law." This is surely consistent with the system of dual federal and state regulation in the banking area, a system which Congress has endeavored to preserve over

the years. See *BT Investment v. Lewis*, 461 F.Supp. at 1200.

The states have traditionally, historically and expressly been left by Congress with wide latitude in regulating not only financial institutions in general, but specifically the trust business. See 12 U.S.C. §§ 92a(a) (1978) authorizing a national bank to act as fiduciary only "when not in contravention of state or local law."[49]

The statute does not impermissibly discriminate against plaintiffs nor other foreign corporations, but merely reflects a proper manner of effectively regulating trust business in Florida, consistent with the dual system of regulation of financial institutions. It imposes no impermissible burden on interstate commerce. Therefore, defendant respectfully submits that § 660.10 should not have been casually stricken as violative of the Commerce Clause.

III

THE LOWER COURT INCORRECTLY APPLIED THE COMMERCE CLAUSE PRINCIPLES ESTABLISHED BY THE COURT IN *PHILADELPHIA V. NEW JERSEY*, IN HOLDING AS UNCONSTITUTIONAL A PORTION OF FLORIDA STATUTES § 659.141(1) (1977) AND FLORIDA STATUTES § 660.10 (1977)

[49] See *American Trust Co. v. South Carolina*, 381 F.Supp. 313, 323 (D.C. S.C. 1974). A South Carolina statute which prohibits corporations organized in contiguous states from acting as a testamentary trustee for a South Carolina decedent was held valid under a Commerce Clause attack because it applied equally to state and national banks.

In holding a portion of § 659.141(1) as violative of the Commerce Clause, the district court heavily premised the decision on its interpretation and application of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As with § 660.10, the court found that the statute was *per se* unconstitutional, as a "basically protectionist measure." 461 F. Supp. at 1196. But here too as with § 660.10, the court misapplied *Philadelphia* in reaching this conclusion.[50] An analysis of the facts in *Philadelphia*, in light of § 659.141(1), will show how the court misconstrues and misapplies the Commerce Clause principles as enumerated by this Court.

In *Philadelphia*, the court was concerned with a New Jersey statute which basically prohibited the importation of most solid or liquid waste which originated or was collected outside of the state. New Jersey effectively closed its borders to all waste from other states, with a few narrow exceptions. The purpose of the New Jersey law, as set out in the statute itself, was to protect the quality of the environment of New Jersey, recognizing at the same time that the available and appropriate landfill sites within the state were being diminished. However, certain passages of legislative history suggested that the problem addressed by the law was primarily financial: stemming the flow of out-of-state waste into certain landfill sites will extend their lives, thus delaying the day when New Jersey cities must transport their waste to more distant and expensive sites. 98 S.Ct. at 2536.

In holding the statute as a "protectionist measure," the court stated, at 2537,

[50] See Point II of Appellant's Brief, pp. 47-49.

> "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space . . . [T]he State has overtly moved to slow or freeze the flow of commerce for protectionist reasons . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Clearly, this type legislation did indeed establish discrimination against articles of commerce coming from outside the state. There was no reason, apart from their origin, to treat them differently.

However, in the instant case, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operation of which are principally conducted outside this state" may not control businesses performing banking and closely related activities in the state. A foreign bank corporation whose operations were principally conducted in this state could control a bank, trust company or investment advisory business. Conversely, a domestically incorporated business which had its principal operations out of the state would feel the same effect of the prohibition. The burden thus falls equally on foreign and domestic businesses alike.

Nor has § 659.141(1) "overtly moved to slow or freeze the flow of commerce." It only limits, but does not ex-

clude, out-of-state ownership of investment advisory offices. The statute would allow a nonbanking or nontrust out-of-state corporation to open an investment advisory office in Florida to compete with Florida investment advisors.

While plaintiffs may argue that the restrictions of § 659.141(1) impose a burden on them, and that their operations may have an impact on interstate commerce, it does not immediately follow that the statute thereby burdens interstate commerce. See *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117(1978). A regulation which peculiarly burdens a firm in interstate commerce need have no restrictive effect on other interstate businesses or on interstate commerce generally.

Recently, in *Exxon Corp,* 437 U.S. at 129, the Court reaffirmed the principle that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. In *Exxon,* a Maryland law was upheld which prohibited oil refiners from operating retail service stations and required them to extend uniform "voluntary allowances" of gasoline to all stations they supplied. Even though the divestiture provision imposed severe burdens on certain interstate businesses, in some cases resulting in the withdrawal of several refines from the Maryland market altogether, the Court expressly found that interstate commerce nevertheless remained unaffected.[51]

[51] The appellants in *Exxon* contended that the Maryland divestiture law affected interstate commerce by weakening the independent refiners, thereby changing the structure of the interstate market. The Court rejected this argument, refusing to "accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." 437 U.S. at 127.

Thus it follows from the holding in *Exxon* that, absent some showing that a state enactment inhibits the flow of goods or services in interstate commerce, the Commerce Clause does not compel the state to justify its action even though the provision may affect certain businesses or business practices in interstate commerce or alter the "structure" of the interstate market. See *Detroit Automotive v. Lee,* 463 F. Supp. 954, 964 (D.Md. 1978); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 806 (1976).[52]

The facts in the instant case come closer to *Exxon* than *Philadelphia. Philadelphia* represents state legislation that overtly freezes or blocks the flow of commerce for protectionist reasons and discriminates against products for no reason other than origin. On the other hand, *Exxon,* represents legislation that places no burden on the interstate flow of articles of commerce, but limits some, but not all, out-of-state firms by preventing them from controlling in-state facilities.[53]

Similarly, § 659.141(1) while discriminating to some extent as to some but not all out-of-state interstate firms, does not affect the flow of investment advisory services in interstate commerce. The fact that plaintiffs and other foreign based bank holding companies receive the brunt of the restriction does not necessarily mean that the statute burdens the flow of interstate commerce. The law does

[52] A similar argument is made as to § 660.10 see pp. 49-51 of Appellant's Brief.

[53] See gray Brief in Support of the Jurisdictional Statement for the Conference of State Bank Supervisors as Amicus Curiae, pp. 8-12.

not curtail the availability of interstate goods or services to consumers. There is certainly nothing in the record to suggest there are added costs on investment advisory services caused by this regulation. As far as the consumer is concerned, there is no distinction in the market place. As noted in *Exxon*, the Commerce Clause protects the market, *not* the marketer. To this extent, plaintiffs failed to sustain their burden, and thus the state need not justify its action, nor demonstrate non-discriminating alternatives.

Even if some burden on interstate commerce is found, defendant submits that § 659.141(1), as well as § 660.10, should be viewed as laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. at 624.

Fundamentally, one must distinguish between the regulation of financial institutions and regulation of other more commonly known "articles" or services which may affect interstate commerce. Banking and trust business, which have traditionally been viewed together, involve matters of public trust and peculiar fiduciary responsibilities, and have a significant impact on local and national economic affairs. Consideration of financial institutions in light of large conglomerate bank holding company control only enhances the significance of this impact. The very nature of financial institutions themselves may necessarily require some burden on interstate commerce. To this extent, one must keep in mind these distinguishing characteristics when discussing banking and trust regulations which are subjected to Commerce Clause attacks.

The subject laws concern areas of substantial state interest. Section 660.10, as noted in Point II of Appellant's

Brief, concerns the regulation of fiduciary activities, an area of traditional state concern.[54] Investment advisory business is also an area of state concern, and subject to both federal and state control. Subchapter II of the Investment Companies and Advisors Act states, at 15 U.S.C. § 806-18a:

> Nothing in this subchapter shall affect the jurisdiction of the securities commissioner of any state over any security or any person insofar as it does not conflict with the provisions of this subchapter and regulations thereunder.[55]

A comparison of § 659.141 as it defines and restricts certain organizations from furnishing "investment advisory services" discloses no conflict with the federal regulation of investment advisors and is thus permissible. Therefore, it cannot be denied trust business and investment advisory business are areas of permissible state regulation and control. They are also directed to legitimate local concerns and do not unduly burden interstate commerce.

The principle effect of § 659.141(1) and § 660.10, to the extent that it compliments § 659.141(1), is to limit the expansion of foreign based bank holding companies into banking and "closely related" activities. This action is certainly consistent with the congressional intent and purpose behind the Bank Holding Company Act of 1956,

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[54] See note 12, *supra*, at p. 23.

[55] It should be noted that the defendant, the Commissioner of Banking of the State of Florida, is also the Securities Commissioner in Florida. See Chapter 517, Florida Statutes.

i.e. to limit the concentration of economic power in the hands of bank holding companies, and to separate banking and commerce by prohibiting entry into nonbanking activities. Indeed, Congress, through 12 U.S.C. §§ 1842(d) and 1846, granted to the states, the power to limit bank holding company expansion across state lines into not only banking, but into activities "closely related to banking."[56] And as noted above, these statutes place only a negligible burden on interstate commerce, if any at all, since they govern the control of outlets for articles of commerce and not the flow of articles themselves.

Even if both Florida laws impermissibly burden interstate commerce, Congress, pursuant to the Bank Holding Company Act, has authorized the states to pass these statutes. It has long been held that Congress, under its power over interstate commerce, may legitimately approve regulations by the states that would otherwise violate the Commerce Clause. See *e.g., Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946). In such event, usual commerce restrictions, such as those announced in *Philadelphia v. New Jersey, supra, Pike v. Bruce Church, supra,* do not apply because Congress is deemed to have consented to such legislation.

Defendant submits that Congress, through provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1842(d) and 1846, has affirmatively consented to Florida's prohibition on the entry of foreign based bank holding companies and their subsidiaries into Florida. The district court

[56] See argument in Point I, for full discussion.

specifically, and we contend erroneously, rejected this contention, 461 F.Supp. at 1198-1201.

As to § 1846, Reservation of Rights to States, the court reasoned that the language "accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to the passage of the Act." 461 F.Supp. 1199. The court arrives at this conclusion after analyzing the remarks of the Fifth Circuit in *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978):[57]

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. See, e.g., the Wilson Act of 1890, 26 Stat. 313. Congress had also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state regulation. See the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 et seq. The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

[57] The case was reversed and remanded on venue grounds in *Leroy v. Great Western Corporation,* ____U.S.____, 99 S.Ct. 2710 (1979).

Id. at 1281. Taking this language as dispositive of the issue, the district court below reasons, "Similarly, 12 U.S.C. § 1846 does not explicitly speak to exempting state banking and bank holding company regulation from the limitations of the Commerce Clause, and no such exemption should be read into the statute by this court."

However, the court has incorrectly and arbitrarily placed a rigid standard by which one merely looks to the specific language of a statute, without considering congressional intent and legislative purpose. To the contrary, the statutory language must be read in the context of congressional intent of an act, to determine if it operates to insure that the states are free to regulate a particular area without fear of attack under the Commerce Clause.

In *Great Western, supra,* the court viewed not only to the language of § 28 of the 1934 Securities Act, 15 U.S.C. § 78bb (1970),[58] but also to the legislative history in light of the particular state statute under attack: the Idaho takeover law. The Fifth Circuit noted; 557 F.2d at 1281,

> The legislative history of § 28 demonstrates that even if we were to interpret § 28 to remove some commerce clause restrictions, that consent would not be broad enough to settle the commerce

[58] Section 28 of the 1934 Act, 15 U.S.C. § 78bb (1970), provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder

> clause issue raised by the Idaho takeover law. The jurisdiction preserved in § 28 is that "of state security commissions to regulate transactions *within their own borders.*" H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933) . . . The Idaho takeover law, in contrast, controls transactions made throughout the world.

In contrast, the legislative history of 12 U.S.C. § 1846 demonstrates that Congress expressly preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under the Act.[59] The subject Florida laws clearly fall within these parameters.

In addition, the language and legislative history of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*,[60]

[59] See note 32, *supra,* at 38 and accompanying text.
text.

[60] The Act provides in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several State . . .
>
> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . .

show that § 1846 comes closer in comparison with this Act than recognized by the district court, in determining whether Congress gave the states a free hand to regulate bank holding companies within their borders without fear of attack under the Commerce Clause.

The McCarran-Ferguson Act was enacted in 1945 in response to this Court's decision in *United State v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), holding that the business of insurance is interstate commerce. See *Group Life & Health Ins. v. Royal Drug Co.*, ___U.S.___, 99 S.Ct. 1067, 1076 (1979). There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. The power of the states to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the states are free to regulate insurance companies without fear of Commerce Clause attack. *Group Life*, 99 S.Ct. at 1076, not 18.

Similarly, the primary purpose of 12 U.S.C. § 1846 was to preserve state regulation of the activities of bank holding companies and their subsidiaries, and is broad enough to bar them from extendng their domains.[61] And it also operates to assure that the states are free to regulate bank holding companies and their subsidiaries without fear of Commerce Clause attack.

[61] See Point I-B and note 33, *supra*, at p. 39 and accompanying text.

The fact that § 1846 may not explicitly speak to exempting state bank holding company regulation from limitations of the Commerce Clause is of no consequence, because the legislative history of the 1956 Act does indeed require one to reach this conclusion. To this extent the district court erred in its analysis, by failing to take into account the proper congressional intent behind the 1956 Act and the scope of § 1846.

Likewise, in holding that 12 U.S.C. § 1842(d) did not demonstrate congressional consent to Florida's prohibition on the entry of foreign based bank holding companies, the district court misconstrues the intent of Congress.

In addressing 12 U.S.C. § 1842(d), the district court erroneously concluded that the Florida laws, "by drastically curtailing the rights of foreign bank holding companies and their subsidiares to engage in banking-related businesses in this state, are at least inconsistent with, if not contrary to, the desires of Congress." 461 F.Supp. at 1200. As shown in Point I-A of Appellant's Brief, the court misconstrues not only the scope of § 1842(d), but also the congressional intent and effect of the 1970 Amendments to the 1956 Act. Prior to the 1970 Amendments, § 1842(d) had been construed, in conjunction with § 1843(c)(8), as prohibiting bank holding company expansion across state lines, into "closely related" activities.[62] Furthermore, the 1970 Amendments to § 1843(c)(8), retaining the "closely re-

[62] See note 18, *supra*, at p. 28 and text of Point I-A at p. 27-28.

lated" language and adding the "public benefits" test, did not alter this prohibition.[63]

Therefore, as with § 1846, the district court erred in concluding that Congress, through § 1842(d), did not affirmatively consent to Florida's prohibition on the entry foreign based bank holding companies and their subsidiaries into Florida.

In enacting the Bank Holding Company Act of 1956, Congress has allowed the states a great deal of flexibility in their regulation of bank holding companies. More importantly, the Act operates to insure that the states are free to regulate bank holding companies and their subsidiaries without fear of attack under the Commerce Clause.

[63] See Point I-A at pp. 30-36.

CONCLUSION

The Judgment and Order of the district court, declaring Florida Statutes § 660.10 (1977) and a portion of Florida Statutes § 659.141(1) (1977) unconstitutional as violative of the Commerce Clause and enjoining defendant from enforcing that portion of § 659.141(1), should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Florida Statutes § 659.141 provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3), no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in the state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from the effective date of this act or from the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of 2 years from time to time if it determines that any such extension would not be detrimental to the public interest, but any such extension shall

not exceed 1 year and all thereof shall not in the aggregate exceed 3 years.

(2) Except as provided in subsection (3), for the purposes of this section:

(a) "Holding company" means any business organization which has control over any bank, trust company, or holding company, the operations of any of which are principally conducted inside or outside of the state.

(b) Any business organization has control over a bank, trust company, or holding company if:

1. The business organization, directly or indirectly or acting through one or more persons, owns, controls, or has power to vote 25 percent or more of the shares of any class of voting securities of the bank, trust company, or holding company;

2. The business organization controls in any manner the election of a majority of the directors or trustees of the bank, trust company, or holding company; or

3. The department determines that the business organization directly or indirectly exercises a controlling influence over the management or policies of the bank, trust company, or holding company.

(c) A business organization provides investment advisory services if, in this state, for compensation, it engages in the business of advising persons, as defined in § 1.01, either directly or indirectly, or through publications or writings, as to the value of securities or as to the advis-

ability of investment in or purchasing securities, or if, not being a certified public accountant, in this state and for compensation, it issues or distributes to persons, as defined in § 1.01, anaylses or reports concerning securities.

(d) The operations of a bank, trust company, or holding company are principally conducted outside this state if:

1. In the case of a bank, the largest amount of its total deposits are held outside this state;

2. In the case of a trust company, the largest amount of its total trust assets are held or administered outside this state; and

3. In the case of a holding company, the largest amount of the total deposits of all banks controlled by the holding company is held outside this state, or the largest amount of the total trust assets held by all trust companies controlled by the holding company is held or administered outside this state.

(e) "Business organization" means and includes any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within 25 years or not later than 21 years and 10 months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by this state.

(f) Shares of any kind or class of voting securities of a bank, trust company, or holding company shall be

deemed to be indirectly owned or controlled by a business organization if:

1. The shares are owned or controlled by any bank, trust company, or holding company over which the business organization has control; or

2. The shares are held or controlled directly or indirectly by trustees for the benefit of:

a. The business organization;

b. The shareholders or members of the business organization; or

c. The employees of the business organization, whether exclusively or not.

(g) Shares of any kind or class of the voting securities of any bank, trust company, or holding company which are transferred directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with, or subject to control by, the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the department, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee.

(h) "Trust company" means any bank, corporation, or other business organization, whether organized or existing under the laws of this state or any other state or jurisdiction, which engages in, or is authorized to engage in, trust business.

(3) Notwithstanding any other provisions of this section, the restrictions and prohibitions of this section shall not apply:

(a) To the acquisition and retention of shares of the voting securities of a bank, trust company, or holding company by a bank or trust company acquiring or holding the same in a fiduciary capacity, except as provided in subparagraph (2)(f)2. and paragraph (2)(g). For the purpose of the preceding sentence, shares of a bank, trust company, or holding company shall not be deemed to have been acquired in a fiduciary capacity if the acquiring bank or trust company has sole discretionary authority to exercise voting rights with respect thereto; except that this limitation is applicable in the case of a bank or trust company acquiring such shares prior to the effective date of this act only if the bank or trust company has the right, consistent with its obligations under the instrument, agreement, or other arrangement establishing the fiduciary relationship, to divest itself of such voting rights and fails to exercise that right to divest within a reasonable period not to exceed 1 year after the effective date of this act.

(b) To the ownership or control of shares acquired by a bank, trust company or holding company in connection with its underwriting of securities, if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis.

(c) To ownership, control, or retention of shares acquired in securing or collecting a debt contracted in good faith, until 2 years after the date of acquisition or the effective date of this act [March 28, 1972], whichever is later.

(d) To the ownership or control of shares acquired by a bank, trust company, or holding company prior to January 1, 1972.

(e) To any acquisition of a bank, trust company, or investment advisory business organization if an application for approval of such acqusition or notice of proposed investment advisory activities was filed with the Department of Banking and Finance or the Board of Governors of the Federal Reserve System or other appropriate federal regulatory agency having jurisdiction prior to June 1, 1972.

(f) To the establishment of one office in this state by a business organization which, on March 1, 1972, and for a period of 1 year prior thereto, rendered investment advisory services to trust companies or banks in this state from an office outside the state.

(g) To any bank, trust company, or holding company the operations of which are principally conducted outside this state, which, upon December 20, 1972, owned all the assets of, or control over, a bank or trust company located within and doing business within this state.

(h) To any bank authorized under 12 U.S.C.A. §§ 611-632, commonly referred to as "Edge Act Banks," when performing functions authorized under said act.

APPENDIX B

Florida Statutes § 660.10 provides:

All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state as follows:

(1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent by original or ancillary; provided, that if the executor or administrator of the estate of a nonresident decendent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicle of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by § 734.30.

(2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.

(3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.

(4) As trustee of any real estate in this state or any

interest therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrustees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this

state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument covering real or personal property in the state proposed to be given or hereafter or heretofore given to such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

APPENDIX C

12 U.S.C. § 1842(d) provides:

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all of substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

APPENDIX D

The relevant portion of 12 U.S.C. § 1843 provides:

§ 1843. Interests in nonbanking organizations

(a) Ownership or control of voting shares of any company not a bank; engagement in activities other than banking. Except as otherwise provided in this Act no bank holding company shall—

(1) after the date of enactment of this Act [enacted May 9, 1956], acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment [enacted Dec. 21, 1970], after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in

such paragraph or in any order or regulation issued by the Board under such paragraph: . . .

(c) Exemptions. The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501], or to any labor, agricultural, or horticultural organization to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection,

the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern; . . .

APPENDIX E

12 U.S.C. § 1846 provides:

§ 1846. Reservation of rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 C.F.R. § 225.4(a)(4) and (5) provides in relevant part:

(a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), In the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial adviser to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940, to an investment company registered under that Act; (iii) providing portfolio investment advise to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.

PROOF OF SERVICE

I, Franklyn John Wollett, one of the attorneys for GERALD A. LEWIS, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of November, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Appellant's Brief on the Merits on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing us such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esq. and Stephen E. Day, Esq. of Mathews, Osborne, Ehrlich, McNatt, Gobelman and Cobb, at 1500 American Heritage Life Building, Jacksonville, Florida, 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esq., of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida, 32802;

3. On The New York Clearing House Association, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, John L. Warden, Esq., H. Rodgin Cohen, Esq., and Robert D. Owen, Esq., of Sullivan & Cromwell, 125 Broad Street, New York, New York, 10004;

4. On Conference of State Bank Supervisors, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, Erwin N. Griswold and James F. Bell, of Jones, Day, Reavis and Pogue, 1100 Connecticut Avenue, N.W., Washington, D.C., 20036.

All parties required to be served have been served.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida, and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

On Appeal From The United States District Court, Northern District of Florida, Tallahassee Division

BRIEF FOR THE APPELLEES

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Argument:

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A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution. 14

B. Section 660.10, Florida Statutes, is, by itself, patently discriminatory against out-of-state corporate fiduciaries, and places an impermissible burden on Interstate Commerce. 25

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Hughes v. *Oklahoma*, —— U.S. ——, 99 S.Ct. 1727 (1979)	17,23,24
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	19
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Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction and Casuistry in the Age of Enterprise*, 30 U. Chi. L. Rev. 680, 702-03 (1963)	28
Stern, *The Commerce Clause and the National Economy, 1933-1946 (pt. 2)*, 59 Harv. L. Rev. 883, 888-93 (1946)	28
Legis. Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971)	49
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida, and Commissioner of Banking of the State of Florida,

Appellant,

vs

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR THE APPELLEES

OPINIONS BELOW

Appellees concur with Appellant's statement of the Opinions Below.

JURISDICTION

Appellees concur with Appellant's statement of the Court's Jurisdiction, subject to their Motion to Affirm.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. United States Constitution Article I, § 8, Cl. 3. Congress shall have "power . . . to regulate commerce . . . among the several states . . . ."

2. Florida Statutes § 659.141(1) (1972 Supp.). (The pertinent portion of the statute is set forth in Appendix herein).

3. Florida Statutes § 659.141(1) (1977). (The full text of the statute is set forth in the Brief for the Appellant, Appendix A).

4. Florida Statutes § 660.10 (1977). (The full text of the statute is set forth in the Brief for the Appellant, Appendix B).

5. 12 U.S.C. § 1841(b) and (c) (1976). (The pertinent portion of the statute is set forth in Appendix herein).

6. 12 U.S.C. § 1842 (1976). (The pertinent portion of the statute is set forth in Appendix herein).

7. 12 U.S.C. § 1843(a) and (c)(8) (1976). (The full text of the statute is set forth in the Brief for the Appellant, Appendix D).

8. 12 U.S.C. § 1846 (1976). (The full text of the statute is set forth in the Brief for the Appellant, Appendix E).

9. 12 C.F.R. § 225.4(a)(4) and (5) (1978). (The full text of the Regulations is set forth in the Brief for the Appellant, Appendix F).

10. 12 C.F.R. § 225.4(b)(1) (1978). (The full text of the Regulation is set forth in Appendix herein).

QUESTIONS PRESENTED

1. Whether the challenged statutes, both individually and in combined effect, overtly discriminate against interstate commerce based solely upon factors of out-of-state origin, and are therefore *per se* unconstitutional.

   A. Whether the challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

   B. Whether Section 660.10, Florida Statutes, is, by itself, patently discriminatory against out-of-state corporate fiduciaries, and places an impermissible burden on interstate commerce.

2. Whether the discrimination of Section 659.141(1), Florida Statutes, against interstate commerce is authorized by the Bank Holding Company Act.

STATEMENT OF THE CASE

Appellee BANKERS TRUST NEW YORK CORPORATION (hereinafter "Bankers Trust") is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. Section 1841 *et seq.*. Appellee BT INVESTMENT MANAGERS, INC. (hereinafter "BT Investment") is a corporation organized and incorporated on November 24, 1972, under the laws of the State of Delaware, and is a wholly-owned subsidiary of Bankers Trust. BT Investment qualified under the laws of the State of Florida to do business in Florida on November 27, 1972.

Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. Section 1843(c)(8)(1976), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System (hereinafter "Board") to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board has provided by regulation that "[p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "[a]cting as an investment or financial adviser" are such activities. 12 C.F.R. Sections 225.4(a)(4) and (5)(1978).

On October 3, 1972, Bankers Trust applied to the Board, pursuant to 12 U.S.C. Section 1843(c)(8) and 12 C.F.R. Section 225.4(b)(1)(1978), for authority to operate through its proposed subsidiary, BT Investment, from an office located in Palm Beach, Florida, as an investment and financial adviser. At the time of that application, Section 659.141(1), Florida Statutes (1972 Supp.), generally prohibited any bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring or retaining all or substantially all of the assets of, or control over, any business organization having a place of business in Florida which furnishes investment advisory services *to trust companies or banks in Florida.* The contemplated activity of BT Investment was not within the prohibition of the statute.

Objections were filed to Appellees' application by both the Comptroller of the State of Florida, Appellant's predecessor in office, and the Florida Bankers Association, hereinafter "FBA", amicus curiae herein.

Coincidentally, while Appellees' application was pending, the Governor of the State of Florida called the Legislature into special session, in order to consider legislation concerning capital punishment and other subjects unrelated

to this litigation.[1] Largely at the urging of Appellant's predecessor and FBA, and in direct response to Appellees' pending application,[2] the Legislature of the State of Florida hurriedly enacted an amendment to Section 659.141(1), Florida Statutes (1972 Supp.)[3] extending its prohibition of the furnishing of investment advisory services so as to preclude Appellees from rendering such services to "any person" rather than, as theretofore, only to Florida trust companies and banks.

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[1]Article III, Section 3(c)(1), of the Constitution of the State of Florida provides that the Governor may convene the Legislature in special session by a proclamation specifying the matters to be considered at that session. Only matters within the purview of that proclamation may be considered, unless introduced by consent of two-thirds of the membership of each house. The proclamation of the Governor for the November, 1972, session is contained at Vol. 1, Laws of Florida, 1973, page 1.

[2]In its Order Denying Proposal to Act as an Investment Adviser, the Board found:

> It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 366 (1973).

[3]House Bill 25-A was admitted for introduction with the consent of two-thirds of the membership of the Florida House of Representatives on November 29, 1972, Journal of the Florida House of Representatives, p. 25 (November 29, 1972); was placed on the House Special Order Calendar on November 30 without having been heard or subjected to substantive analysis by any committee, Journal of the Florida House of Representatives, p. 28 (November 30, 1972); and was passed by the House of Representatives and immediately certified to the Florida Senate that same day, Journal of the Florida House of Representatives, pp. 29-30 (November 30, 1972). The Bill was taken up out of order with the consent of two-thirds of the membership of the Florida Senate and passed on the floor of the Florida Senate that same day, Journal of the Florida Senate, p. 21 (November 30, 1972). It then became Chapter 72-726, Laws of Florida (1973), without the Governor's signature.

On April 26, 1973, the Board issued an order denying Appellees' proposal to act as an investment adviser. The Board's Order states in pertinent part:

> Absent the recent enactment of amendments to Section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. • • • However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. 59 Fed. Res. Bull. 364, 365 (1973).

Though the Board recognized the Florida Legislature's action as an attempt to prevent out-of-state competition,[4]

[4]Throughout its Order Denying Proposal to Act as an Investment Adviser, the Board reiterated its conclusion that the 1972 amendment to Section 659.141(1) was intended to protect Florida interests from out-of-state competition in general and from Appellees in particular. At page 365 of its Order, the Board noted the Congressional recognition that the *de novo* entry of bank holding companies into a new market would have procompetitive effects. The Board found, however, that the 1972 amendment was intended to preclude Bankers Trust from engaging in this competition. The Board stated:

> There appears to be tacit agreement that the recently enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. *Id.* at 365.

The Board also noted that:

> [T]he legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. *Id.* at 366.

Reviewing this order and the findings of the Board in their entirety, the Fifth Circuit Court of Appeals noted in *BT Investment Managers, Inc.*, v. *Lewis*, 559 F.2d 950, 954 n. 13 (5th Cir. 1977):

> Reviewing the circumstances of the enactment of the amendment to *Fla. Stat.* Section 659.141(1), the Federal Reserve Board minced no words in characterizing the Florida legislature's action as a brazen attempt to prevent out-of-state competition.

it nonetheless held that, solely because of the amendment to the act, it was required to disapprove the Appellees' application,[5] and that it did not have the judicial power to rule on Appellees' contention that such an act was unconstitutional.[6]

On November 13, 1973, Bankers Trust petitioned the United States Court of Appeals for the Second Circuit for review of the Order of the Federal Reserve Board denying its proposal to act as an investment adviser. That petition has been withdrawn with leave of the court to reinstate at the option of petitioner, pending the outcome of the instant litigation.

This action was commenced on October 24, 1973, to secure a judicial declaration and injunction restraining enforcement of Sections 659.141(1) and 660.10, Florida Statutes. Shortly after commencement of the action, Appellant moved to dismiss based on the "abstention" doctrine arguing, *inter alia,* that the federal court should abstain from ruling on the constitutionality of these statutes until their possible application to Appellees had been determined by the courts of Florida. Though this motion

[5]The Board stated:

> In brief, since the Board is of the opinion that the proposal is prohibited by State law it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal. *Id.* at 366.

[6]The Board stated:

> The Board is not sympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby the proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." *Id.* at 366.

However, the Board had previously noted:

> BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. *Id.* at 366.

was granted by the three-judge court, the Fifth Circuit Court of Appeals noted that this contention was, "in view of appellees' role in blocking approval of appellant's application . . . frankly speaking, incredible," and reversed and remanded so that the three-judge court could pass on the constitutionality of the statutes. *BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954 n. 13 (5th Cir. 1977). The court stated:

> Indeed, by their very terms the challenged statutes could scarcely be clearer in effect, if not in purpose—that is, to rid Florida banking and trust interests of non-Florida competition in the area of investment counseling. *Id.* at 954 (footnote omitted).

It was stipulated by the parties at trial below that, but for the existence of the challenged statutes, Bankers Trust would have applied to the Board for authority to engage, through a subsidiary, in the activity of performing or carrying on at a place of business in Florida one or more of the activities or functions that may be performed or carried on by a trust company in a manner authorized by Florida law, but without the power to accept demand deposits or make commercial loans, and would have organized such a trust company under the laws of the United States or the State of Florida.[7] After extensive briefing and argument on the merits, the three-judge court held that Section 660.10 and the first sentence of Section 659.141(1) were patently discriminatory against out-of-state concerns and that the record conclusively indicated that the legislation was *per se* unconstitutional as contemplated by this Court in the recent case of *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). In the instant case the three-judge court stated:

> The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, supra,* this parochial legislation must be deemed *per se* unconstitutional. 461 F. Supp. at 1196.

[7]Stipulation filed May 11, 1978 at pp. 2-3, Appendix at pp. 23-24 (hereinafter referred to as "Stipulation").

It is from this order that the Comptroller of the State of Florida has appealed.

SUMMARY OF ARGUMENT

I. The Challenged Statutes, Both Individually and in Combined Effect, Overtly Discriminate Against Interstate Commerce Based Solely Upon Factors of Out-of-State Origin, and are Therefore Per Se Unconstitutional.

A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

The constitutional principles underlying the three-judge court's decision as to both of the challenged statutes are reiterated in this Court's recent opinion in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). As affirmed therein, the aim of the Commerce Clause is to preserve a truly national economy, and no state may place itself in a position of economic isolation. This Court has historically been vigilant to the evils of economic isolation and protectionism, and in *Philadelphia* declared that "where simple economic protectionism is effected by state legislation, a virtually

per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624 (citations omitted).

Every impartial forum that has reviewed Section 659.141(1), Florida Statutes (1977) and was familiar with the history of its enactment has correctly concluded that it is a blatant form of overt economic isolationism, both by intent and in effect. Appellant and amici curiae virtually admit this intended discrimination in their respective briefs.

Like the statute stricken in *Philadelphia,* the present statutes are basically protectionist measures, accomplishing a discrimination against interstate commerce based purely on state of origin. No legitimate state interest has been advanced, either in evidence or by logical argument, and this vacuum is not filled by vague references to the spectre of economic concentration nor the argued need for enhanced regulation. The challenged statutes aggravate rather than remedy the suggested but unproven problem of economic concentration by facilitating the growth of local bank holding companies in a competition-free market. Appellee BT Investment has fully qualified to do business in Florida, and it has been stipulated of record that both Appellees are fully subject to the regulatory arm of the state.

Appellant and amici curiae improvidently rely on *Exxon Corporation* v. *Governor of Maryland,* 437 U.S. 117 (1978). In fact, a proper reading of that decision supports the holding of the trial court, and establishes the unconstitutionality of the challenged statutes in that (1) they are not directed at a specific evil, (2) they do not apply evenhandedly to all business organizations flawed by that evil, and (3) the differing impact on out-of-state concerns by the challenged statutes is clearly their intended and principal effect, and

not merely incidental to an otherwise valid regulation. Because the principal effect of the challenged statutes is to protect local concerns from competition with out-of-state companies, they are *per se* unconstitutional, *Philadelphia* v. *New Jersey, supra,* and the "balancing approach" applied by this Court in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970) is not reached. Even if the *Pike* test were applied to the challenged statutes, it is clear that their absolute prohibition significantly burdens interstate commerce and, as noted above, they are devoid of any counter-balancing legitimate local purpose.

B. Section 660.10, Florida Statutes is, by itself, Patently Discriminatory against Out-of-State Corporate Fiduciaries, and Places an Impermissible Burden on Interstate Commerce.

The court below found that the challenged statute, on its face, "cordons off Florida trust companies from competition by out-of-state concerns", 461 F. Supp. at 1196, and accordingly is subject to a "virtually per se rule of invalidity." *Philadelphia* v. *New Jersey, supra.* Appellant suggests that the requirements of Section 660.10, Florida Statutes, are neutral in their effect on business, both within and without Florida, while inconsistently admitting that the statute would require Appellees to establish a Florida subsidiary corporation and obtain a Florida trust charter, which he strenuously argues would be violative of both state and national law. Again, *Exxon Corporation* v. *Governor of Maryland, supra,* is cited by Appellant in support of this inconsistent position. As noted above, however, the rationale of that opinion would condemn a statute such as Section 660.10 which establishes differing treatment for entities not based upon a legitimate state interest, but rather solely upon their place of incorporation. Each of the other authorities cited by Appellant in support of this position specifically applies only to regulation against *intrastate*

commerce, and their applicability to "Commerce Clause" litigation defies understanding.

It is clear that Section 660.10, Florida Statutes, not only runs afoul of the *Philadelphia* "virtually per se rule of invalidity", but also fails to satisfy the "balancing test" of constitutionality formulated by the Court in *Pike*. Nor may the statute be supported as furthering the state's legitimate interest in regulating the activities of trust companies, in light of Appellant's stipulation recognizing the state's otherwise sufficiently broad regulatory powers. *See also Fain* v. *Hall,* 463 F. Supp. 661 (M.D. Fla. 1979).

II. The Admitted Discrimination of Section 659.141(1), Florida Statutes, Against Interstate Commerce is Clearly Not Authorized by the Bank Holding Company Act.

Apparently recognizing the weakness of his constitutional arguments, Appellant has shifted the major emphasis in his Brief to the proposition that such admittedly discriminatory statutes have been sanctioned by Congress through the Bank Holding Company Act. A proper analysis of the Act itself leads to a clearly contrary conclusion.

Section 3(d) of the Act provides a Congressional prohibition on acquisition of "banks" across state lines, but by its terms and by the statutorily prescribed definition of "bank", this section clearly does not apply to "companies other than banks." Where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 201 (1976). The Act by its terms provides separate regulatory schemes regarding the acquisition of "banks" (12 U.S.C. Section 1842) and "companies" other than banks (12 U.S.C. Section 1843). Nothing in the provisions regarding the acquisition

of companies other than banks restricts their acquisition by holding companies to any geographical limits such as state boundaries.

The differing treatment of the Act afforded to acquisitions of "banks" and acquisitions of "any company not a bank" is entirely consistent with the intent of Congress as gleaned from the legislative history surrounding both the original enactment of the Act and its subsequent amendments. It is indisputable that Congress intended to regulate the concentration of commercial banking resources so as to avoid abuses related to the concentration and control of commercial credit, while at the same time facilitating and encouraging the development of bank holding companies into other areas related to banking but not presenting the same potential for abuse. The many inconsistent and unsupported arguments presented by Appellant and amici curiae in their attempts to misconstrue and extend the provisions of Section 3(d) of the Act do not support their request to this Court that it expand the clear limitations enacted by Congress.

It is undisputed that the Act provides a separate regulatory scheme by which bank holding companies may acquire interests in companies other than banks. The Douglas Amendment, by its clear terms, defined within the Act, does not apply to such acquisitions. The Douglas Amendment does not, as Appellant suggests, provide a Congressional authorization to the states to discriminate against interstate commerce, but rather clearly establishes a Congressionally imposed prohibition. Although states are permitted by the Act to exempt themselves from this Congressionally imposed prohibition, nowhere is there an authorization to the states to enact their own prohibition or to expand that provided by Congress. Thus the constitutional infirmity of the challenged statutes is not remedied by recourse to the Bank Holding Company Act.

ARGUMENT

I. The Challenged Statutes, Both Individually and in Combined Effect, Overtly Discriminate Against Interstate Commerce Based Solely Upon Factors of Out-of-State Origin, and are Therefore Per Se *Unconstitutional.*

A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

The constitutional principles underlying the three-judge court's decision as to both of the challenged statutes are reiterated in this Court's recent opinion in *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) which was rendered shortly before the decison below. That case was the subject of separate supplemental briefs by each of the parties, and was analyzed in detail by the three-judge court.

In striking down the discriminatory legislation in *Philadelphia*, this Court recalled the axiom that it is the aim of the Commerce Clause to preserve a truly national economy. Quoting from *H. P. Hood and Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-38 (1948), the Court stated:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." 437 U.S. at 623.

In *Philadelphia*, 437 U.S. at 623-24, the Court traced its historical vigilance to the evils of "economic isolation

and protectionism" while at the same time recognizing that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." The Court noted at page 624 that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected," and found that "[t]he clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."

Application of these long-standing principles to the challenged statute is so clear as to foreclose further debate. Every impartial forum that has reviewed Section 659.141(1), Florida Statutes (1977), and which was familiar with the history of its enactment, has concluded that it is a blatant form of overt economic isolationism.[8]

Inconsistently, Appellant and amici curiae FBA and Conference of State Bank Supervisors (hereinafter "State Supervisors") would suggest to this Court that Section 659.141(1) is not discriminatory, while at the same time arguing that it was *intended to be discriminatory* pursuant to a (wrongly perceived) Congressional authorization to burden interstate commerce.

At page 48 of his Brief, Appellant admits that Section 659.141(1), in conjunction with Section 660.10, does "cordon off Florida trust companies from competition by out-of-state concerns." As noted by this Court in *Philadelphia*,

> [t]he crucial inquiry . . . must be directed to determining whether [the statute under scrutiny] is basically a protentionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects

[8] In regard to the findings of the Board and the Fifth Circuit Court of Appeals, see n. 4, *supra*. The three-judge court reached an identical conclusion at 461 F. Supp. 1196, quoted herein at pp. 8-9, *supra*.

upon interstate commerce that are only incidental. *Id.* at 624.

Further, the Court stated that "whatever [the state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently." *Id.* at 626-27 (emphasis added).

Both on its face and in plain effect, Section 659.141(1) violates this constitutional principle of non-discrimination. In truth, the discrimination against Appellees based purely on origin fairly leaps from the face of the statute. Section 659.141(1) does *not* purport to generally prohibit the providing of investment advisory or trust services, nor does it evenhandedly provide a common scheme of regulation or prohibition as to the rendering of such services by all bank holding companies or their subsidiaries. Instead, it blatantly and by its clear terms provides that only those bank holding companies *whose operations are principally conducted outside of Florida* are precluded from controlling business organizations having a place of business in the state of Florida from which they furnish investment advisory services in that state.[9]

In *Philadelphia*, the purported evil sought to be regulated by the state statute was the accumulation of waste. Assuming the validity of New Jersey's evidence that the problem was a real one, this Court nonetheless very properly held that it was impermissible for the statute to specifically impose

[9]Barely three pages after positing that the statute is not discriminatory, Appellant again admits this discriminatory intent. In returning to his argument that such discrimination is authorized by the Bank Holding Company Act, Appellant states at page 59 of his Brief:

> The *principle* [*sic*] *effect* of Section 659.141(1) and Section 660.10, to the extent that it complements Section 659.141(1), is to limit the expansion *of foreign based* bank holding companies into banking and "closely related" activities. (Emphasis added).

only on *out-of-state interests* the full burden of solving the problem.

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. . . . [T]he State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. 437 U.S. at 628.

Neither the Appellant nor FBA urged at trial below any specific problem that could even purportedly serve as a legitimate basis for the statutes.[10] Appellant and amici curiae now seek to legitimize the statutes by vague references to problems of economic concentration and state regulation. Neither the spectre of economic concentration nor the argued need for enhanced regulatory control possibly apply to save this statute.

Even assuming the unproven legitimacy of the fear of undue economic concentration as a result of bank holding companies expanding their trust and investment advisory activities, Section 659.141(1) is not aimed at solving that

[10]Throughout their briefs, Appellant and amici curiae urge that the current regulation ought to be upheld because it involves an *area* of traditional state concern. Appellees readily admit that banking is an area of traditional state concern, and that the states retain their full police power in that area to legislate for all aspects of the public health, safety and welfare. However, this police power can be invoked in a Commerce Clause context only where the legislation is rationally related to achieving a *specific state purpose* within an area of concern and the burden on interstate commerce is unsubstantial or incidental. As recently stated by this Court in *Hughes* v. *Oklahoma*, _____ U.S. _____, 47 U.S.L.W. 4447, 4451 (1979), the relevant inquiry as to this phase of the Commerce Clause analysis is "whether the statute *serves a legitimate local purpose.*" *Philadelphia, supra*, clarifies that even if legislation attempts to address the state problem, it cannot discriminatorily cast the full burden of solving that problem on out-of-state concerns.

problem.[11] And even if it were, the ruling of this Court in *Philadelphia* establishes that Florida cannot cast the full burden of solving that problem upon out-of-state commercial interests alone.

Neither can Florida justify its total prohibition of all out-of-state competitors on the basis of some presently imagined difficulty of adequately controlling them, when, for example, Appellee BT Investment has fully qualified to do business in Florida, and the chief constitutional officer with primary authority for regulating financial institutions (the Appellant) has stipulated in this very proceeding that both Appellees are amenable to process from Florida courts and are ready, willing and able to comply with all statutory, regulatory or supervisory provisions governing the conduct of their proposed business activities in Florida. Stipulation at 2-3.[12]

[11]Even if the existence of such a problem is assumed, these statutes are not directed at solving it. The centralization and accumulation of economic influence is in no way precluded by these statutes but is merely reserved for the Florida bank holding companies to the exclusion of non-Florida competitors. Likewise, the subject statute does not attempt to regulate or control the activities dealt with (investment advisory services or trust activities). Rather, it attempts to differentiate based on the principal place of activity of the corporations that would be performing those activities, all of which corporations would admittedly be subject to state control and regulation. Again, the purpose of the statute is not to insure the state's ability to regulate, but rather to protect and isolate local interests from interstate competitors. Thus, both the purpose and the effect of the subject statutes are exactly opposed to solving the problem suggested by Appellant and State Supervisors. Section 659.141(1) both in purpose and effect actually encourages and facilitates the concentration and accumulation of the financial oligopoly existing in Florida by insulating the oligopoly against the procompetitive effect of Appellees' proposed *de novo* activities.

[12]The argument of State Supervisors at pages 22 and 23 of its Brief that the fostering of locally controlled business is a legitimate state rationale for excluding out-of-state competition serves as further evidence of the discriminatory intent and effect of these statutes.

On the contrary, State Supervisors simply misconstrues those portions of the cited opinions from which it has concluded the existence and extent of such a permissible state interest. For example, in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds*, _____ U.S. _____, 99 S.Ct. 2710, the court did not embrace the sort of absolute prohibition of out-of-state competition which exists in the present case. Rather, it expressly found that a state "corporate takeover" statute which had the effect of protecting incumbent management would be unacceptable if its purpose were "to prevent the removal of local business to other states." *Id.* at 1282. Only then did the court accept the state's argument that its "interest in benevolent management is a legitimate reason for [the state] to regulate the means by which outsiders can change management," *id.* at 1283, but went on to invalidate the takeover statute under the "balancing approach" of *Pike* v. *Bruce Church, Inc., supra*, on the grounds that such local "benefits" were outweighed by the corresponding burdens on interstate commerce, *id.* at 1286. In *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), the state sought to promote its interest in the "[l]ocal autonomy of banks," *id.* at 809, by evenhandedly halting all further acquisitions thereof by holding companies. The state supreme court upheld this measure against federal and state (but *not* Commerce Clause) constitutional attack, as a legitimate response by the state to the (then) recently enacted Bank Holding Company Act of 1956. In contrast, the statutes involved here are *not* an evenhanded prohibition against *all* holding company acquisitions, and do not at all deal with acquisition of "banks," as to which *Congress* imposed the prohibition against holding company interstate acquisition.

In futile attempt to avoid the consequence of a Commerce Clause analysis, State Supervisors urges at page 8 of its Brief that the scrutinized statutes do not affect interstate commerce. The court below, at the outset of its opinion, specifically found that the business activities affected by the challenged statutes constitute interstate commerce. Relying upon the decisions of this Court in *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), the three-judge district court ruled that:

> The necessary effect on interstate commerce has been demonstrated here even though no direct evidence to prove such an effect has been presented. This conclusion is compelled, first, because of the pervasive range of federal

To say that exclusion of out-of-state competition can be justified by the desire to foster the local economy is to urge the epitome of economic protectionism.

regulation of bank holding companies and their subsidiaries through the powers vested in the federal government under the commerce clause. This extensive regulation must constitutionally be founded upon a nexus between the provision of financial services and commerce between the states. *No party to this case has contended that the connection to interstate commerce of the activities involved here is so insubstantial as to rob Congress of its authority to regulate in this field.* 461 F. Supp. at 1194 (footnotes omitted) (emphasis added).

It is inconsistent for amicus State Supervisors to argue, on the one hand, that Congress has the power under the Commerce Clause to authorize the states to regulate investment advisory and trust services through 12 U.S.C. Sections 1842(d) and 1846 while, on the other hand, claiming that such activities, though concededly "commerce", are not interstate in their nature or effect.[13] It cannot seriously be suggested that such investment advisory services are not within interstate commerce in light of the significant Congressional regulation of this field through the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1 *et. seq.*. This Act, like other federal laws regulating the marketing of investment securities which preceded it,[14] is necessarily

[13]State Supervisor relies extensively on *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), seeking to analogize the prepaid medical services in issue there to Appellees' proposed trust and investment advisory services, which are markedly distinct in their purpose and effect on interstate commerce. As in *Oregon*, the decision of the court in *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975) cited by State Supervisors also turned upon an express finding that the business in question (a local real estate reciprocal listing service) was purely *intrastate* in its character and effect. On the other hand, trust and investment advisory services are, like the sale of insurance contracts considered by the Court in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), but a link in "a chain of events which becomes interstate commerce." *Id.* at 547.

[14]Securities Act of 1933, 15 U.S.C. sec. 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. sec. 78a *et seq.*; Public Utility Holding Company Act of 1935, 15 U.S.C. sec. 79 *et seq.*; Trust Indenture Act of 1939, 15 U.S.C. sec. 77aaa *et seq.*; Investment Company Act of 1940, 15 U.S.C. sec. 80a-1 *et seq.*.

based upon Congressional finding that such activities are interstate in their nature or effect.[15]

As for trust and other fiduciary services, the Comptroller of the Currency is authorized to charter national banking associations whose operations are "to be limited to those of a trust company and activities related thereto"—in effect, national trust companies. 12 U.S.C. Section 27, *as amended by* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Public Law 95-630, Section 1504, 92 Stat. 3641. The exercise by Congress of its legislative prerogative in this area must necessarily invoke the authority of the Commerce Clause. All trust departments and companies so chartered are subject to the continuing scrutiny and regulation of the Board. It is specious to suggest that these activities do not substantially affect interstate commerce.

[15]In its declaration of findings with which it introduced the Investment Advisers Act of 1940, Congress announced that:

> [I]nvestment advisors are of national concern, in that, among other things—
>
> (1) their advice, counsel, publications, writings, analyses and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;
>
> (2) their advice, counsel, publications, writings, analyses and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and
>
> (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy. 15 U.S.C. Section 80b-1.

Appellant and amici curiae rely heavily on *Exxon Corporation* v. *Governor of Maryland*, 437 U.S. 117 (1978). In fact, a proper reading of that decision only further establishes the unconstitutionality of these statutes in that (1) it noted the evenhandedness of the statute itself, and the absence of the discriminatory features which are apparent from the face of Section 659.141(1); (2) unlike Section 659.141(1), the regulation enacted by the statute examined in *Exxon* was directed at a specific evil and evenhandedly applied to *all* business organizations which were flawed by that evil; and (3) the differing impact on out-of-state concerns was merely incidental to this otherwise valid regulation rather than the very purpose for its enactment.

Obviously, that statute was not on its face discriminatory as it would have been had it applied only to those corporations "the operations of which are principally conducted outside the state." This very distinction was considered sufficiently significant by the Court in *Exxon* to merit specific reference. The Court stated:

> In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *The absence* of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce. *Id.* at 126 (emphasis added).

It was only after noting the absence of these patently discriminatory factors that the Court in *Exxon* undertook to analyze whether or not the differing impact on out-of-

state concerns was merely incidental, or constituted an *impermissible* burden on interstate commerce. Even if this analysis is reached, in contrast to the *Exxon* statute, the present ones do not legislate generally and evenhandedly against a specified form of business organization to remedy a specific evil attendant to that organization. They instead discriminate between organizations of *identical* structure based solely on geographic origin.[16]

Surprisingly, State Supervisors has raised the case of *Hughes* v. *Oklahoma*, ——— U.S. ———, 99 S.Ct. 1727 (1979), for the proposition that "facial discrimination [does] not *require per se* treatment." Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 15. In the instant case, any debate as to whether or not a discriminatory intent that is "merely facial" requires *per se* treatment is irrelevant in light of the clear reality and Appellant's own admission that "[t]he *principle* [*sic*] *effect* of Section 659.141(1) . . . is to limit the expansion of *foreign based* bank holding companies." Brief for the Appellant at 59 (emphasis added). Where both the language employed and the admitted principal effect of legislation is to cast its full burden on interstate commerce, it is ludicrous to suggest that the statute is not rank economic protectionism and thus

[16]Similarly, Appellant has raised at Page 49 of his Brief the case of *Detroit Automotive Purchasing, Inc.* v. *Lee*, 463 F. Supp. 954 (D. Md. 1978) as a case in which a comprehensive system of licensing was held valid in spite of its impact on interstate commerce because that statute "did not discriminate against any particular segment of commerce, but rather against a particular way of doing business." *Id.* at 49 n. 47. Discussing this case in relation to Section 660.10, Appellant asserts that "if it discriminates at all, it only discriminates against a particular way of doing trust business." As discussed in this Brief, *infra*, the above distinction has no merit even vis-a-vis Section 660.10. However, in the context of Section 659.141(1), it should be observed that the statute upheld in *Detroit Automotive* stands in marked contrast to the one scrutinized here, in that Section 659.141(1) is obviously *not* aimed at bank holding companies in general, but at *foreign* bank holding companies only. Thus this statute can in no way be characterized as being directed at "a particular way of doing business."

per se unconstitutional. This is exemplified in *Philadelphia,* and is consistent with both *Hughes* and *Pike* v. *Bruce Church, Inc., supra.*

At page 20 of its Brief, amicus State Supervisors urges that the balancing test of *Pike* ought to have been applied by the court below to confirm the constitutionality of both challenged statutes. Though State Supervisors cites *Pike* generally, it refrains from fully stating the balancing test from that case, which test Section 659.141(1) very clearly fails. Initially, it would be impossible to find that Section 659.141(1) "regulates evenhandedly" when the statute, on its face and in its clear and admitted effect, discriminates against otherwise identical objects of regulation based solely upon in-state and out-of-state considerations. Because of this discrimination on its face and in its principal effect, the statute also fails the "no patent discrimination" test which *Philadelphia* specifies as a prerequisite to the application of *Pike.* 437 U.S. at 624.

Secondly, the statute fails to "effectuate a legitimate local interest." State Supervisors argues correctly that banking is a general *area* in which the states have traditionally been given broad authority to regulate, but nowhere has Appellant or any amicus curiae raised any particular problem within the area of banking that this statute is designed to solve.[17] Neither has anyone advanced any evidence or logical arguments that this statute was designed to enhance the state's *ability* to regulate, and no such argument can be made in good faith in light of the stipulated ability of Appellant to effectively regulate.[18]

As to whether the burden imposed by this statute is "only incidental", any assertion that the statute passes this test is ludicrous in light of the admitted reality that "[t]he

[17]See discussion of the purported problem of economic concentration at pages 17-18 and note 11, *supra.*

[18]See discussion of Appellant's stipulated ability to regulate at page 18, *supra.*

principle [*sic*] effect of Section 659.141(1) is to limit the expansion of *foreign based* bank holding companies." Brief for the Appellant at 59 (emphasis added).

Similarly, Appellant argues that the statute is constitutional because it doesn't discriminate against *all* out-of-state entities, and would allow a non-banking or non-trust out-of-state corporation to open an investment advisory office in Florida. Brief for the Appellant at 56. This attempted diversion from the discriminatory feature of the statute ignores the reality that, among those business entities which are in all other material respects identical, the statute discriminates against some based upon purely in-state/out-of-state considerations.[19]

B. Section 660.10, Florida Statutes is, by itself, Patently Discriminatory against out-of-state Corporate Fiduciaries, and Places and Impermissible Burden on Interstate Commerce.

In holding Section 660.10, Florida Statutes, violative of the Commerce Clause of the United States Constitution, the court below found that this statute, in effect, "cordons off Florida trust companies from competition by out-of-state

[19]Appellant also seems to suggest that discrimination by geographic factor of principal place of business is less onerous than discrimination based upon place of incorporation. The erection of such restrictive trade barriers based on either factor is the nemesis of a single national economic unit, and either form of geographic discrimination promotes economic Balkanization.

The arguments of Appellant and amici curiae also lack consistency. In seeking to uphold Section 660.10, they argue (*see* Brief for the Appellant at 48) that interstate commerce is not burdened because a corporation can avoid the discrimination by incorporating in Florida, yet, when discussing Section 659.141(1) they inconsistently argue that discrimination based on principal place of activity is constitutional because it doesn't discriminate on the basis of origin of ownership. By this game of musical arguments, they would have this Court believe that discrimination based upon origin of incorporation and based on principal place of activity are both permissible simply because each form of geographic discrimination is not based on the other.

concerns." 461 F. Supp. at 1196. Applying the longstanding principle that such "economic isolation" is subject to a "virtually per se rule of invalidity," the Court need look no further in affirming the ruling below. *Philadelphia* v. *New Jersey*, 437 U.S. at 624.

Appellant suggests, inconsistently, that the requirements of Section 660.10, Florida Statutes, are "neutral in their effect on business, both within and without Florida" while admitting that the statute "requires an out-of-state entity to establish a Florida subsidiary corporation and obtain a Florida trust charter, if it wants to engage in trust activities in Florida." Brief for the Appellant at 48. This burden, it is reasoned, is sustainable on the grounds that it "is directed not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services." *Id.* at 50.

In support of this argument, Appellant seeks to analogize this statute to those which were upheld against similar attacks in *Exxon Corporation* v. *Governor of Maryland, supra*, and *Detroit Automotive Purchasing Services, Inc.* v. *Lee*. 462 F. Supp. 954 (D. Md. 1978). Brief for the Appellant at 48-49. As discussed *supra*, a complete reading of this Court's decision in *Exxon* would lead one to the inescapable conclusion that Section 660.10 is constitutionally invalid because it distinguishes those corporate fiduciaries which may qualify to perform trust functions within Florida not upon some rational basis reasonably related to a legitimate state interest, but solely upon their place of incorporation. Citing the *Detroit Automotive* decision, Appellant overlooks the important distinction that the Maryland statute in issue there merely imposed a reasonable licensing scheme which, as a prerequisite to the sale of automobiles within the state of Maryland, prevented an unlicensed out-of-state corporation from transacting its business therein. No attempt was made by Maryland to deny such a license solely on the basis

of the corporation's foreign charter. Nor, in this case, do Appellees deny the right of the state of Florida to reasonably license and evenhandedly regulate those corporations, if any, which are to perform trust functions within its borders.

The decision of this Court in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), cited by Appellant and amici State Supervisors and FBA for the general proposition that a state may exclude a foreign corporation from doing business within its borders,[20] turned upon the express finding of the Court that the business in question, insurance, was "not a transaction of commerce" or, at best, consisted of "local transactions, . . . governed by the local law." *Id.* at 183. Disregarding this Court's subsequent ruling to the contrary on the issue of insurance as interstate commerce in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), it is clear that the above-stated principle of the *Paul* decision should be limited to those instances where the Court finds the business at issue purely local or intrastate.

Similarly, Appellant relies on the 1931 decision of this Court in *Railway Express Agency* v. *Virginia*, 282 U.S. 400, for the proposition that a state may require a foreign corporation to obtain a corporate charter from that state in order to transact local business therein. Brief for the Appellant at 51-52. But as in *Paul, supra*, the Court's decision in *Railway Express* was based upon a initial finding that the business sought to be transacted within the State of Virginia was purely local or intrastate. Such a result is not surprising, given the reported facts of that case and the restrictive construction applied to the term "interstate commerce" by the Court at that point in our nation's

[20]Brief for the Appellant at 23 n. 12; Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 23-24; Brief in support of the Appellant of Florida Bankers Association as Amicus Curiae at 17-18.

history.[21] On the other hand, the business sought to be transacted by Appellees in the instant case is so substantially interstate in nature and effect as to require "constitutional scrutiny" of the state's efforts to so regulate it. 461 F. Supp. at 1194 n. 9, citing *Philadelphia* v. *New Jersey, supra.*[22]

In a case more closely analogous to the present one, this Court ruled that a state is not free to impose licensing and other burdensome requirements on a foreign corporation seeking to transact interstate business therein, even though the corporation incidentally undertook some local or intrastate business of the same nature within that state as well. *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891). Speaking for the Court, Mr. Justice Bradley noted that:

> To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. *Id.* at 57.

It is clear that, even accepting the continued vitality of *Railway Express, supra*, that case did not support a state's ability to exclude a foreign corporation desiring to engage in interstate commerce within its borders.

[21] *See, e.g., Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). *See generally*, Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction and Casuistry in the Age of Enterprise*, 30 U.Chi.L.Rev. 680, 702-03 (1963); Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 Harv.L. Rev. 883, 888-93 (1946).

[22] As to the interstate nature of the commerce affected by the present statutes, see pages 19 through 21, *supra*.

Earlier this year, Florida's statutory prohibition of non-resident individual personal representatives was invalidated on the grounds that it arbitrarily and unreasonably restricted the Florida testator's right to choose a personal representative, in violation of the Fourteenth Amendment to the United States Constitution. *Fain* v. *Hall*, 463 F. Supp. 661 (M.D. Fla. 1979). In so holding, the district court weighed the asserted state interest in the timely and honest administration of Florida estates against the resulting restriction of individual choice, and found the statute lacking. Of particular note were the court's determinations that the non-resident individual personal representative of a Florida estate would be amenable to service of process of Florida courts, could be required to post a suitable bond for the protection of the estate, its creditors and beneficiaries, and otherwise would be subject to the same criteria for appointment and grounds for removal as those individual personal representatives who are residents of Florida. *Id.* at 664-65.

Even if we were to incorrectly assume that Section 660.10, Florida Statutes is *not* so clearly protectionist on its face that it runs afoul of the *Philadelphia* "virtually per se rule of invalidity", it still fails to satisfy the "balancing" test of constitutionality formulated by this Court. *Pike* v. *Bruce Church, Inc., supra; Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976). The statute does not apply evenhandedly to foreign and domestic trust companies, presents an absolute barrier to performing trust business in Florida by out-of-state concerns[23] and serves no demonstrated state interest.

[23] As discussed at note 19, *supra*, it is blatantly inconsistent to argue that Section 660.10 is constitutionally permissible because it discriminates based only on place of incorporation, and at the same time argue that Section 659.141(1) is permissible because it avoids discrimination based on this factor. Appellant's attempt to reconcile Section 660.10 with the dictates of the Commerce Clause by suggesting that incorporating a Florida subsidiary represents a slight burden flies directly in the face of his previous argument that the Douglas Amendment to the Bank Holding Company Act forbids the acquisition of such subsidiaries.

Appellant and amici curiae refer to the "important regulatory concern" of the state in this area "traditionally left to the control and regulation of the states", and amici cite the fact that Florida is not alone in attempting to so regulate the fiduciary powers of foreign corporations. Brief for the Appellant at 51; Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 24-28; Brief in Support of Appellant of Florida Bankers Association as Amicus Curiae at 17. Yet, nowhere in their briefs do Appellant or these amici set about to list or explain the interests which the State of Florida undertakes to protect or the purpose to be promoted[24] through Section 660.10. Nor has there been any apparent attempt to consider those interests in the light of the burden placed in their behalf on interstate commerce, or to determine whether those interests "could be promoted as well with a lesser impact on interstate commerce." *Pike, supra,* at 142. Appellees do not deny the existence of strong

[24]As discussed in note 10 *supra*, the simple cry that the statute falls within an *area* of state concern obfuscates the required inquiry as to whether the statute is directed at solving a particular problem or promoting a specific purpose within that area. Any assertion that Section 660.10 is a "regulatory technique" designed to enhance the regulatory ability of the state is a sham in light of (1) the stipulation by Appellant that Appellee Bankers Trust "is ready, willing, and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida," Stipulation at page 2; (2) the stipulation that the purpose of the proposed trust subsidiary is merely to carry out "one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law," Stipulation at page 2; (3) Florida Statutes fully subjecting such a subsidiary to jurisdiction and process of Florida courts, *see* Chapter 48, Florida Statutes; and (4) local decisions finding that Florida courts possess all the necessary tools to promote the State's interest in assuring that foreign fiduciaries adhere to Florida's policies regarding honest and efficient estate administration. *Fain* v. *Hall, supra.*

Appellant did not introduce any evidence whatsoever as to a deficiency in the state's ability to regulate Florida activities of trust companies incorporated in other states, and the present assertion of such a problem is purely speculative and contrary to the above stipulation, jurisdictional statutes, and court decisions.

state interests in the area of trust services, nor the right of the state to reasonably and evenhandedly regulate them for the public good. Yet, as the court in *Fain* v. *Hall, supra,* recently found when performing a similar balancing test, these legitimate state interests can be served as well by existing measures of control short of an absolute prohibition of nonresident fiduciaries. The applicability of such existing regulatory measures to Appellees has been stipulated of record and is not in issue herein.

II. The Admitted Discrimination of Section 659.141(1), Florida Statutes, Against Interstate Commerce is Clearly Not Authorized by the Bank Holding Company Act.

In an attempt to avoid the obvious constitutional infirmity of Section 659.141(1), Appellant urges that, by enactment of 12 U.S.C. Section 1842(d), Congress has authorized the states to discriminate against foreign bank holding companies in their attempted acquisitions not only of "banks" but also of companies engaged in activities "closely related to banking". Inasmuch as this construction does not appear from (and is in fact contrary to) the language of the Bank Holding Company Act, Appellant argues that such an authorization must be "implied" from his perception of the legislative intent and history of that Act. In fact, a proper reading of both the words employed and the legislative history of the Bank Holding Company Act verifies that no such authority has been granted or implied therein.

The Bank Holding Company Act provides in pertinent part that the Board shall not approve any application by a bank holding company or subsidiary thereof to acquire any interest in

> any additional *bank* located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment . . . unless the acquisition . . . is specifically authorized by the statute laws of the State

in which such bank is located. 12 U.S.C. Section 1842(d) (1976) (emphasis added).

Congress has by this provision affirmatively barred out-of-state bank holding company acquisitions of "banks" unless specifically authorized by the states. Nowhere in the Act are the states authorized to expand that Congressional prohibition to discriminate as to acquisitions of "companies other than banks."

It is well settled as a matter of statutory interpretation that where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976). In this regard, it is difficult to imagine how Congress could have employed any clearer language in this somewhat complex area. The intent is apparent from the language: (1) holding companies may in some circumstances acquire banks (12 U.S.C. Section 1842) and may in some circumstances acquire other companies (12 U.S.C. Section 1843); (2) by 12 U.S.C. Section 1842(d) Congress prohibited the acquisition of "banks" across state lines, unless specifically permitted by state statute; (3) the only authority granted by Congress to the states under 12 U.S.C. Section 1842(d) is this authority to legislate *in favor of* interstate bank acquisitions by bank holding companies rather than *against* interstate commerce generally as Appellant suggests; and (4) nowhere in Sections 1842, 1843 or 1846 is there expressed or implied an authorization for states to discriminate as to other acquisitions. Section 659.141(1), Florida Statutes, is not at all the sort of limited state legislation, exempting Florida from the general Congressional discrimination against interstate bank acquisitions, which 12 U.S.C. Section 1842(d) itself would allow. Thus lacking Congressional authorization, Section 659.141(1) is constitutionally invalid as an admitted attempt by the state of Florida to discriminate (by exclusion)

against interstate commerce in the fields of banking, trust services and investment advice.

The Bank Holding Company Act establishes that bank holding companies have the power to acquire interests in certain companies other than banks. Specifically, 12 U.S.C. Section 1843 fully recognizes and extensively restricts "interests in non-banking organizations", which organizations are clarified to be "any company not a bank." It is therefore obvious the Bank Holding Company Act contemplates that holding companies may in different, specified circumstances acquire interests in both "banks" and "companies not banks," and that Congress has elected to discriminate against out-of-state holding companies only in the acquisition of "banks".

The differing treatment afforded to acquisitions of "banks" and acquisitions of "any company not a bank" has always permeated the Bank Holding Company Act. Though the Act covers *all* acquisitions by bank holding companies, the distinction between acquisitions of "banks" and acquisitions of other "companies" is initially facilitated by the statement of very disparate definitions of those terms. It is evident from those definitions, contained in 12 U.S.C. Section 1841(b) and (c), that the term "company" is defined expansively to encompass practically any perpetually existent business entity.[25] The term "bank" on the other hand, is more explicitly defined in Section 1841(c) to encompass only those entities with specific attributes, primarily the accepting of deposits that may be withdrawn on demand,

[25]The term "company" is presently defined as follows:

(b) 'Company' means any corporation, partnership, business trust, association. or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State. 12 U.S.C. Section 1841.

and engaging in the business activity of making commercial loans.[26]

These definitions facilitate and are used to provide different regulatory treatment as to the circumstances under which a bank holding company may acquire "any additional bank," Section 1842(d), and the circumstances under which a bank holding company may acquire interests in "any company not a bank," Section 1843.[27]

[26]That definition provides:

'Bank' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under Section 25 or Section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States.

[27]This differing regulatory treatment clearly appears from both the titles and substantive provisions of Section 1842 and Section 1843. The title of Section 1842 is "Acquisition of *bank shares or assets*—prior approval of Board as necessary; exceptions." (Emphasis added). This is contrasted with the title of Section 1843 which reads "Interests in non-banking organization—ownership or control of voting shares of any company not a bank; engagement in business other than that of banking." The Congressional selection of those words cannot be taken lightly and such usage was presumptively determined by resort to the definitions that Congress took pains to include in the statute. Clearly, if Congress had intended Section 1842 to govern the acquisition of both banks and other companies which are not banks, it would have been a simple matter for Congress to have provided in Section 1842, and specifically subsection (d) of that section, that it apply to the acquisition of "any additional company." Instead, Congress provided that such subsection should apply only to the acquisitions of assets of "any additional bank." In contrast, it is Section 1843 which by its own specific terms addresses the circumstances under which bank holding companies may acquire interest in "any company not a bank." Totally absent from that section is any authorization to a state to prohibit or discriminate in such acquisition. As noted by the Third Circuit Court of Appeals in *National State Bank of Elizabeth, N.J.* v. *Smith*, 591 F.2d 223, 227, the regulatory authority with the duty to construe this definition (the Board) has concluded that an entity whose powers are limited to the performance of fiduciary operations would not be a "bank" within this definition.

In an effort to "construe" the plain words of Section 1842(d) in order to raise an "implied" authorization to discriminate against out-of-state holding companies as to acquisitions of "companies other than banks," Appellant and amicus State Supervisors have raised no fewer than six obfuscating and often inconsistent false issues which are disposed of below. They are:

1) Since the intent of the Bank Holding Company Act has always been to limit the concentration of financial power, the present wording of the Act must be broadly construed to prohibit interstate acquisitions of both "banks" and "companies" other than banks. Brief for the Appellant at 26.

2) As originally enacted, Section 1842(d) prohibited and therefore must still prohibit acquisitions of companies other than banks across state lines. Brief for the Appellant at 28.

3) The present narrow definition of "bank" should be ignored because it wasn't in the Bank Holding Company Act at the time of enactment of the Douglas Amendment. Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 29-30.

4) Section 1842(d) must be construed to apply to "companies" other than banks as well as to "banks" to preserve the competitive equality of the state and national banking systems and to perpetuate the dual system of banking. Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 30-33.

5) 12 U.S.C. Section 1846 authorizes, recognizes and respects the right of each state to forbid out-of-state holding company acquisitions of companies other than "banks" within their boundaries. Brief for the Appellant at 36-44.

6) The three-judge court generally misconstrued the effect of the 1970 amendments to the Bank Holding

Company Act as a liberalization of that Act and relied upon this construction in striking down the challenged statutes. Brief for the Appellant at 26-27.

These inconsistent and erroneous arguments of Appellant and amicus curiae misperceive the entire issue in characterizing the Bank Holding Company Act as authorizing the states to discriminate against interstate commerce. As discussed *supra*, Section 1842(d) precludes interstate acquisitions of "banks" by out-of-state bank holding companies not by authorizing the states to prohibit those acquisitions, but instead by itself precluding the acquisitions unless the state expressly consents to them.[28] As is apparent throughout the following discussion, Congress could easily and readily have achieved the results Appellant claims were intended simply by using or inserting the word "company" in Section 1842(d) instead of, or along with, the term "bank".

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[28]In the trial proceedings in this litigation, Appellant spent little or no effort characterizing the Bank Holding Company Act as an *authorization to the states* to discriminate. This was so because that argument was not then perceived as being as important as the other arguments relating to the Commerce Clause. In Appellant's present Brief, however, as discussed at page 15 herein, he practically admits that Section 659.141(1) is discriminatory in intent and principal effect, and Appellant and amici curiae direct most of their efforts to false propositions regarding the effect of the Bank Holding Company Act in purportedly allowing that discrimination.

Since several of the false arguments now raised by Appellant and amici curiae are based on the incorrect premise that the *states* have been given broad and unrevoked authority to enact discriminatory legislation, the correction of this false presumption becomes necessary.

False Argument Number 1: The intent of the Bank Holding Company Act requires broad construction of "banks" to include all "companies."

As stated by Appellant at page 37 of his Brief, "Congress recognized that holding companies are not evil of themselves." Excessively generalized cries of "undue concentration of economic power" tend to obliterate the specific types of concentrations that Congress feared and was determined to prevent. Congress did not, as Appellant would have this Court believe, broadly prohibit holding company expansion across state lines or intend generally to retard accumulations of capital that are necessary to the functioning of any capitalistic society. Instead, Congress eschewed such a "shotgun" approach and, through enactment and subsequent amendments of the Bank Holding Company Act, has demonstrated that the evil originally feared was the concentration of *commercial banking resources* and possible abuses related to the *control of commercial credit*.[29]

Indeed, the reason for the narrowing of definitions in 1966 and in 1970 was to confine the Act's regulation of banks to the evil feared and clarify that the word "bank" would encompass only those institutions that accepted demand deposits and made commercial loans, and were thereby in a position to control commercial credit. Obviously, the fear of undue economic concentration through holding company acquisitions of "banks" is not intended to subject acquisitions of "companies other than banks" to the same regulatory treatment reserved for "banks", which are in a position to concentrate and control commercial credit. Thus a generalized claim that the Bank Holding

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[29]See discussion, pp. 40-41, *infra*.

Company Act was intended to prevent undue concentrations of economic power cannot serve as a basis for the drastic expansion of the present Congressional definitions necessary to read the word "bank" in Section 1842(d) as if it really meant "bank or other company."[30]

False Argument Number 2: As originally enacted, Section 1842(d) prohibited and therefore must still prohibit acquisitions of companies other than banks across state lines.

At pages 27 and 28 of his Brief, Appellant argues that the "business of banking" restriction on acquisitions of closely related companies contained in the original Act had and still has the effect of precluding *all* out-of-state acquisitions by holding companies.[31] Thus, Appellant contends that the Douglas Amendment, by prohibiting a holding company from acquiring a *bank* in another state, had the effect of prohibiting acquisitions of closely related companies in other states as well, reasoning that "[i]n fact, there could be no direct and significant connection because there could be no banking subsidiary." Brief for the Appellant at 28. There are several flaws in this imaginative argument, the most obvious of which is that the "business of banking" language which serves as the key to this approach was deleted by the 1970 amendments and therefore could not possibly serve as a present impediment to acquisitions of closely related companies in other states. Even if the words of the 1956 Act or subsequently rejected judicial construc-

[30]As discussed above, the notion that Section 659.141(1) was enacted pursuant to a perceived Congressional authorization for the states to legislate for the prevention of undue concentrations of economic power is also inconsistent with the fact that this section is clearly not directed at such a purpose. *See also* n. 11, *supra*.

[31]Appellant asserts that under the Board's early construction of the original Act no holding company could acquire a subsidiary "whose activities were not 'directly and significantly connected' to the banking operations that the particular holding company was already engaged in." Brief for the Appellant at 28.

tions of that language had the effect of precluding out-of-state acquisitions of closely related companies, such a result arose directly and solely from the *Congressional* prohibition and decisions construing it, and died with the repeal of those words.

The second flaw is that, as Appellant himself notes, the 1970 deletion of the phrase "the business of" from 12 U.S.C. Section 1843 was not intended by Congress to be a departure from the supposed previous Congressional policy of requiring a "direct and significant connection", but was primarily sought by the Board

> *to make it clear* that non-banking activities need not relate to the particular banking business of the applicant, thus permitting activities in areas *geographically removed* from the applicant's bank operations. Conference Report, [1970] U.S. Code Cong. & Ad. News 5566-67 (emphasis added), *quoted in* Brief for the Appellant at 34.

Thus it is clear that even if the Board's "direct and significant connection" holdings had once prevented interstate acquisitions of closely related companies as Appellant contends, the 1970 amendments were intended to reject such a misconstruction and clarify that such a result had *never* been the intent of Congress.

At page 35 of his Brief, Appellant acknowledges that the deletion of the "business of banking" phrase, coupled with the above statement of legislative intent, manifests a Congressional desire to relax any geographic restriction that had been attributed by the Board to those words. However, Appellant then speculates that there is nothing to suggest relaxation of restrictions on expansion across state lines. Appellant's reasoning is both circular and internally inconsistent in that it posits a Congressional intent to enact geographic restrictions based upon the phrase "business of

banking'' (when any such restriction arose purely from the Board's early interpretations of that phrase) and then inconsistently suggests that part of that restriction remained even when Congress repudiated the restriction and deleted the phrase giving rise to it. In fact, the above quote from the Conference Report clarifies beyond dispute that to the extent any geographic restriction was attributed by the Board to the original phrase, that restriction was intended to be *totally* removed by the deletion of the phrase.

> *False Argument Number 3:* The present narrow definition of ''bank'' should be ignored because it wasn't in the Bank Holding Company Act at the time of the Douglas Amendment.

At pages 29 and 30 of its Brief State Supervisors argues that since 12 U.S.C. Section 1842 was originally enacted with reference to a previous, broader definition of the term ''bank'', Section 1842 must presently be construed as if that definition were fixed and immutable, and had not been altered by subsequent Congressional enactments. Thus, in construing the term ''bank'' in Section 1842, State Supervisors would have the Court ignore the Congressional amendments of 1966 and 1970, which culminated in the present definition.

The major flaw in this argument is that amicus State Supervisors offers no reasoning, beyond conjecture, to support its inference that Congress had the original definition of ''bank'' in mind when it drafted the Douglas Amendment, but somehow overlooked the certain effect on the Douglas Amendment when it later altered the definition of the term ''bank''. Indeed, as the Senate Banking and Currency Committee report on the 1970 amendments clearly shows,

> [t]he definition of ''bank'' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent

> possible abuses related to the control of commercial credit. However, *the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans.* The committee, accordingly, adopted a provision which would *exclude institutions that are not engaged in the business of making commercial loans from the definition of ''bank.''* S.Rep. No. 91-1084, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5541 (emphasis added).

State Supervisors asks this Court to presume that Congress did not know what it was doing, and did not mean what it said, when it amended the definition of ''bank'' in both 1966 and 1970. The change in the definition of ''bank'' effected in 1966 was a portion of Public Law 89-485, 80 Stat. 236 (1966). It is significant to note that that same Congressional act, Public Law 89-485, also contained a comprehensive alteration of the Douglas Amendment itself. Thus, it cannot credibly be contended that Congress was unaware of the Douglas Amendment at the time Public Law 89-485 was enacted.

The simple and irrefutable matter of law is that Section 1842 presently only affects the ability of holding companies to acquire ''banks'' as that term is presently defined in Section 1841, and Section 1843 presently governs the circumstances under which holding companies can acquire ''companies other than banks''.

> *False Argument Number 4:* Preservation of competitive equality in the dual system of banking is in question.

At page 30 of its Brief, State Supervisors argues that the term ''bank'' in Section 1842(d) must be construed to really mean ''company'' in order to preserve the competitive equality between state and national banks.

This argument by State Supervisors attempts to redefine the terms "state" and "national" as applied to banks in the context of competitive equality within the dual banking system. The terms do not relate to a geographic sphere of activity as State Supervisors misuses them, but rather refer to the governmental body chartering the entity. The authorities cited refer only to the intent of Congress to insure equal treatment and equal competitive standing between state chartered banks and banks chartered by the Comptroller of the Currency.

This general statement of Congressional intent, although interesting, has no relevance to the issues presented in the instant proceedings. The ability of a bank holding company to own subsidiary companies in states other than its state of principal activity is totally unrelated to whether its banks are state chartered or nationally chartered. In fact, the principal bank owned by Bankers Trust is Bankers Trust Company, a state bank chartered by the state of New York, whereas several of the smaller bank subsidiaries of Bankers Trust, operating in the state of New York, are nationally chartered.

This argument is also obviously fallacious, even under the authorities cited by State Supervisors, in that those authorities and others, including 12 U.S.C. Section 1846, firmly recognize and preserve the ability of the states to reasonably regulate *all* financial and fiduciary institutions doing business within their borders so long as such regulation is evenhanded and not violative of the federal Constitution. In fact, the requirement that legislation must evenhandedly address in-state and out-of-state financial interests (other than in acquisitions of banks, pursuant to Section 1842(d)) is fully consistent with preserving competitive equality of state and nationally chartered financial institutions.

False Argument Number 5: States are authorized by Section 1846 to forbid acquisition of companies other than "banks".

At page 33 of its Brief, amicus State Supervisors asserts that

> The second provision of the 1956 Bank Holding Company Act that authorizes sections 659.141(1) and 660.10 is section 7, which reads:
>
> > The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 U.S.C. Section 1846 (1976)]

Obviously, the states reserve a right to be more restrictive regarding the formation or operation of bank holding companies than federal authorities are under the Bank Holding Company Act.[32] Section 659.141(1) is constitutionally flawed not because it is restrictive, but because it is blatantly discriminatory in its restrictions.

Prior to enactment of the Bank Holding Company Act, the states possessed the power to *evenhandedly* regulate such activities, and Section 1846 clarifies that Congress has not preempted that regulatory ability. As stated by amicus State Supervisors at page 34 of its Brief:

> One power the states clearly retain under section 7 [Section 1846] is the power to prohibit the formation of bank holding companies and to exclude all bank holding companies from their boundaries. *See Whitney National*

[32]Though Appellant, State Supervisors and FBA strain to characterize the three-judge court's ruling as precluding the ability of the states to extensively regulate bank holding companies, Appellees have never contended, and the three-judge court did not order, that anything in the Commerce Clause or the Bank Holding Company Act affected the states' preexisting ability to reasonably regulate financial and fiduciary activities within their borders. The district court fully recognized the continuing ability of the states to evenhandedly regulate in these areas.

Bank v. *Bank of New Orleans & Trust Co.* 379 U.S. 411, 419 n. 5; 102 Cong. Rec. 6752 (1956).

Yet, such an evenhanded prohibition as to a particular form of doing business is not what the FBA has sought through the Florida Legislature in Section 659.141(1).[33] The states have *never* had the power to pass such discriminatory legislation, and Section 1846 could not have been and was not intended to "preserve" a previously nonexistent power.

By its clear terms, 12 U.S.C. Section 1846 is not an affirmative grant of authority to burden interstate commerce, but simply states what the Bank Holding Company Act "shall *not* be construed" to mean. (Emphasis added).[34]

[33]Without exception, the cases cited by Appellant at pages 38-44 of his Brief for the proposition that 12 U.S.C. Section 1846 "granted" the states broad powers all involve state legislation which evenhandedly regulated various aspects of banking therein, without distinction based on geographic factors as in the present case. Appellant's attempt to reason therefrom that "[l]esser bans, such as those in the subject Florida Statutes" should *a fortiori* be upheld ignores the fact that it was only the evenhanded, comprehensive application of the laws in those cases which saved them from constitutional challenge in the first place.

[34]*See, e.g., Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds (venue)*, ——— U.S. ———, 99 S.Ct. 2710 (1979), which held that language similar to 12 U.S.C. Section 1846 was intended only to negate an inference that Congress had generally preempted the securities field from state regulation. In the absence of a specific delegation to regulate commerce, such clauses are mere expressions that the states may continue to exercise pre-existing power, or power "hereafter" acquired, and do not of themselves expand that pre-existing power so as to authorize burdens on interstate commerce.

As quoted from *Great Western* in the opinion of the three-judge court, 461 F. Supp. 1187, 1199:

> When Congress has exempted state laws from Commerce Clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local.

When Section 1846 was originally enacted in 1956, there was concern as to the possibility that it might be construed as an affirmative grant of power to the states, and the Senate committee took special care in its drafting to preclude this result. As stated by Mr. Robinson of the Committee on Banking and Currency:

> A great deal of concern has been expressed that section 7 of the bill as reported by the committee granted new authority and powers to States over national banks in general, and respecting the stocks of national banks in particular. • • •
>
> In order to clarify the legislative history of section 7, the committee wishes to emphasize that this section *does not grant any new authority* to States over national banks. The purpose of this section is to preserve to the States those powers which they *now have* in our dual banking system. S. Rep. No. 1095, Part 2, 84th Cong., 2d Sess. 5 (1956) (emphasis added).

Section 659.141(1) has nothing to do with facilitating or perpetuating a dual and competitively equal system of state-chartered and nationally-chartered banks, and does not fall within the powers the States possessed prior to 1956 and retained by virtue of Section 1846.

Even reading Section 1846 *in pari materia* with Section 1842, it is clear that in neither of those sections has Congress authorized *the states* to affirmatively burden interstate commerce. To the extent the Bank Holding Company Act results in some discrimination against interstate commerce as to acquisitions of "banks", it is a purely *Congressional* dis-

Holding that language similar to Section 1846 was not such a specific delegation of power, the court in *Great Western* stated:

> Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation. 577 F.2d at 1281.

crimination, not to be expanded by the states as to other acquisitions.

False Argument Number 6: The three-judge court misconstrued the effect of the 1970 amendments to the Bank Holding Company Act as a liberalization of that Act.

At various portions of their Briefs, Appellant (pages 26-27, 35-36) and amicus FBA (pages 13-14) attempt to convince this Court that the three-judge court erred in regarding the 1970 amendments to the Bank Holding Company Act as a departure from the original purpose of the Act which they argue was to limit the concentration of economic power in the hands of the bank holding companies.

This "red herring" is a clear mischaracterization of the three-judge court's holding. Indeed, before discussing the effect of the 1970 amendments, the court concluded that "defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies)". 461 F. Supp. at 1200. It is therefore clear that the three-judge court in no way rejected the original intent of the Bank Holding Company Act.

What the three-judge court *did* reject was any contention that the 1966 and 1970 amendments to the Act should be ignored, or that anything in those amendments supported an assertion that trust and investment advisory services were included within the acquisition prohibition contained in Section 1842(d).[35]

[35]The lower court stated at 461 F. Supp. 1200:

> The legislative histories of the Bank Holding Company Act and the 1966 and 1970 amendments to the Act contain nothing to support the conclusion that a state's authority to forbid foreign companies from acquiring banks within that state includes the right also to forbid them from acquiring companies offering services closely related to banking.

Appellant's argument that the 1970 amendments were not a liberalization of the Board's discretion in allowing acquisitions of "closely related companies", simply because the Conference Commitee report retained the "closely related" test as opposed to the "functionally related" test which had been in both the House and Senate Bills, is clearly erroneous, and was joined in by only four of the twelve House/Senate conferees. Three of the House managers declined to sign the Statement of the Managers on the Part of the House, Conference Report No. 91-7147, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561 (hereinafter "House Managers' Statement") relied upon by Appellant, and the inaccuracies of that Statement were pointed out in both the House and Senate floor debates on the Conference Committee bill. In fact, Senator Sparkman spoke on the Senate floor for the specific purpose of assuring that a more accurate view of legislative history would be included in the Congressional Record.[36]

[36]116 Congressional Record S20,638 (daily ed. Dec. 18, 1970). As pointed out by Senator Sparkman, while the conferees were still debating the proposed "functionally related" language, they inquired of the Federal Reserve Board as to the significance of the language, which the Board had originally supported. Letter of November 19, 1970, from Representative Wright Patman to Arthur F. Burns, Chairman, Board of Governors, Federal Reserve Board, printed in 116 Congressional Record S20,639 (daily ed. Dec. 18, 1970). After a meeting of the Board, Chairman Burns responded to the conferees that retaining the "functionally related" language was *not* essential to expanding the Board's discretion, so long as the "business of banking" language previously in the Act was deleted. Speaking of the liberalizing intent of the Board in originally suggesting the "functionally related" language, Chairman Burns stated:

> If the conferees prefer to keep "closely related" in the language of the statute, *our objective would be served* by changing the words "business of banking or of managing or controlling banks" to read "banking or managing or controlling banks."

Letter of November 23, 1970, from Arthur F. Burns to Hon. Wright Patman, printed in 116 Congressional Record S20,639 (daily ed. Dec. 18, 1970) (emphasis added). By deleting the words "business of", the desired liberalization was fully realized without the need to also delete the words "closely related."

Similarly, Senator Bennett, another of the conferees, stated specifically that he did not agree with Representative Patman's interpretation of the Conference Committee Report as expressed by Mr. Patman in the House Managers' Statement and on the floor of the House.[37]

The House floor debate clarifies that a majority of the conferees intended for the 1970 amendments to liberalize the Board's discretion as to acquisition of closely related companies. Though Mr. Patman read most of the House Managers' Statement into the record, 116 Cong. Rec. H11,786-89 (daily ed. Dec. 16, 1970), Mr. Widnall, another of the House conferees, clarified that the House Managers' Statement was in error, *id.* at H11,789-96, and comprehensively rebutted the House Managers' Statement.[38] Representative Widnall's comments were concurred in by both Representative Johnson and Representative Stanton, who had also declined to sign the House Managers' Statement. *Id.* at H11,796.[39]

Based upon the origin of the final language (the Board) and the fact that the liberalizing intent of that language was clearly explained to both the conferees and the full House and Senate prior to voting on the bill, it is obvious and irrefutable that Congress intended to and did broaden the Board's discretion in approving acquisitions of "closely related" companies by its 1970 amendment.

[37]Senator Bennett stated that the amended language of the Act "clearly gives the Federal Reserve Board broader discretion than it now has to make determinations of permissible activities." 116 Congressional Record. S20,645 (daily ed. Dec. 18, 1970). Senator Bennett also pointed out the error of the House Managers' Statement to the effect that deletion of the phrase "financial, fiduciary, or insurance" should not be regarded as expanding the Board's discretion. At pages S20,648-49, he points out:

> This was specifically debated by the committee in executive session and it was decided that this deletion would in no way restrict the flexibility of the Federal Reserve Board *but in fact would increase it,* since some activities which may be in the public benefit, and which may be closely related to banking, may not be financial, fiduciary, or involving insurance. (Emphasis added).

As concluded by Senator Bennett regarding the House Managers' Statement in general:

> I believe, an attempt at this point by four of 12 conferees to use the managers' statement to upset the clear legislative history regarding the terms "closely related" and "functionally related" and the deletion of "financial, fiduciary, or insurance" is very questionable and cannot be considered to represent the understanding or intent of a majority of the conferees. *Id.* at S20,649.

[38]Regarding deletion of the "functionally related" language from the House and Senate bills and the concomitant deletion of the restrictive "business of banking" language, Mr. Widnall noted that one major effect of the Conference Committee report was

> the change of section 4(c)(8) of the 1956 Bank Holding Company Act so as to give the Federal Reserve Board *greater flexibility* in determining what nonbank activities are permissible for bank holding companies and their subsidiaries. *Id.* at H11,789 (emphasis added).

Speaking of the ultimate Conference Committee language, Mr. Widnall stated:

> It should be made clear that the Board recommended this new test and the Board's intent was to introduce a new public interest concept in order to give it the desired flexibility. *Id.* at H11,790.

[39]Reaching a similar conclusion as to the liberalizing effect of the 1970 amendments on non-bank acquisitions, *see National Couriers Association* v. *Board of Governors,* 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act,* 60 Geo.L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities,* 71 Mich.L. Rev. 1970 (1973); Legis. Note, *The Bank Holding Company Act Amendments of 1970,* 39 Geo.Wash L.Rev. 1200 (1971).

CONCLUSION

Sections 659.141(1) and 660.10 are clearly discriminatory against and burdensome upon interstate commerce, and therefore violative of the United States Constitution. The Congress has not authorized or consented to this burden on interstate commerce, and the challenged statutes were properly stricken by the three-judge district court. The Opinion and Order of the three-judge district court are correct and should be affirmed by this Court.

Respectfully submitted,

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Proof of Service

I, Stephen E. Day, one of the attorneys for BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for the Appellees on the several parties thereto, as follows:

1. On Gerald A. Lewis, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, Appellant, by mailing three copies in a duly addressed envelope with postage prepaid to Eugene J. Cella, Esq., and Franklyn J. Wollett, Esq., attorneys of record herein, The Comptroller's Office, The Capitol Building, Tallahassee, Florida 32301;

2. On Florida Bankers Association, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, J. Thomas Cardwell, Esq. of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida 32802;

3. On The New York Clearing House Association, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, John L. Warden, Esq., H. Rodgin Cohen, Esq., and Robert D. Owen, Esq., of Sullivan and Cromwell, 125 Broad Street, New York, New York 10004;

4. On Conference of State Bank Supervisors, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, Erwin N. Gris-

wold and James F. Bell, of Jones, Day, Reavis and Pogue, 1735 Eye Street, N.W., Washington, D.C. 20006.

All parties required to be served have been served.

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1. The pertinent portion of Fla. Stat. § 659.141(1) (1972 Supp.) provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire or retain, directly or indirectly, all or substantially all the assets of, or control over, any trust company having a place of business in this state where trust business or functions are conducted, or acquire or retain all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services to trust companies or banks in this state.***

2. The pertinent portion of 12 U.S.C. § 1841(b) (1976) provides:

(b) "Company" means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

12 U.S.C. § 1841(c) (1976) provides:

(c) "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not

do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

3. The pertinent portion of 12 U.S.C. § 1842 (1976) provides:

§ 1842. Acquisition of bank shares or assets—Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval.

• • •

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. 12 C.F.R. § 225.4(b)(1) (1978) provides:

§ 225.4 Nonbanking activities.

(b)(1) *De novo entry.* A bank holding company may engage de novo (or continue to engage in any activity earlier

commenced de novo) directly or indirectly, solely in activities described in paragraph (a) of this section, 45 days after the company has furnished its Reserve Bank with a copy of a notice of the proposal (in substantially the same form as FR Y-4A) published within the preceding 30 days in a newspaper of general circulation in the communities to be served, unless the company is notified to the contrary within that time or unless it is permitted to consummate the transaction at an earlier date on the basis of exigent circumstances of a particular case. If adverse comments of a substantive nature are received by the Reserve Bank within 30 days after the company has so published its proposal or if it otherwise appears appropriate in a particular case, the Reserve Bank may inform the company that (i) the proposal shall not be consummated until specifically authorized by the Reserve Bank or by the Board or (ii) the proposal should be processed in accordance with the procedures of paragraph (b)(2) of this section.

Supreme Court, U. S.
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No. 79-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, *Appellant*.

v.

BT INVESTMENT MANAGERS, INC., ET AL., *Appellees*.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF ON BEHALF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

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Bikle, *The Silence of Congress,* 41 Harv. L. Rev. 200 (1927) 20

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G. Fischer, *Bank Holding Companies* 9 (1961) 22

P. Heller, *Handbook of Federal Bank Holding Company Law* 45-46 (1976) 33

1 L. Loss, Securities Regulation 47 (1961) 26

4 L. Loss, Securities Regulation 2219 (1969) 26

Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis,* 37 Va. L. Rev. 1119 (1951) 25, 26

1 Scott, *The Law of Trusts* § 1.11 (3d ed. 1967) 25

2 Scott, *The Law of Trusts* § 96.6 (3d ed. 1967) 24, 25

5 Scott, *The Law of Trusts* § 588 (3d ed. 1967) 25

Stephenson, "Rights of Out-of-State Trust Institutions," 16 *Studies in Trust Business,* 2d Series 335 (1944) 26

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, *Appellant.*

v.

BT INVESTMENT MANAGERS, INC., ET AL., *Appellees.*

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF ON BEHALF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

This brief is filed under Rule 42(1) of the Rules of this Court, with the consent of all parties to the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida is reported at 461 F. Supp. 1187 (N.D. Fla. 1978). The order of March

22, 1979, altering and amending the order of December 15, 1978, is not reported but is set out in an appendix to Appellant's Jurisdictional Statement (App. D1-D2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth fully in the Appellant's Jurisdictional Statement, and are not repeated here.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that Florida Statutes § 659.141(1) (1977), which prohibits holding companies, banks, and trust companies that do not conduct their operations principally in Florida from owning or controlling any trust company or investment advisory business that does conduct its business in Florida, is invalid under the Commerce Clause of the United States Constitution.

2. Whether Florida Statutes § 660.10 (1977), which regulates the provision of personal fiduciary services, an area of traditional and long-standing state concern, is invalid under the Commerce Clause of the United States Constitution simply because it may have the effect of prohibiting certain categories of out-of-state business entities from providing such services in-state.

3. Whether Congress, in either section 3(d) or section 7 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1842(d) and 1846 (1976), has authorized Florida and other states with similar statutes to enact provisions such as those contained in Florida Statutes § 659.141(1) and § 660.10.

INTEREST OF AMICUS

The Conference of State Bank Supervisors ("the Conference") is an association composed of the officials of state governments responsible for the regulation of state-chartered banking institutions in every state of the United States and in Guam, Puerto Rico, and the Virgin Islands. As of December 31, 1978, the Conference's members had jurisdiction over 10,275 state-chartered commercial and mutual savings banks with total resources of approximately $659 billion. The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958. There are currently 5,960 such members.

The Conference's Board of Directors, consisting entirely of members (*i.e.*, state bank supervisors), has authorized the filing of this brief because the decision below, if allowed to stand, will significantly undermine the traditional authority of the states to regulate the provision of personal fiduciary services—an area which has never been regulated to any significant extent by Congress and has always been left almost entirely to the states. In short, the decision below is important not only with respect to the Florida statutes directly involved, but also because it will, if upheld by this Court, have the effect of invalidating or otherwise bringing into question comparable provisions in the statutes of many other states as well.[1]

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[1] A list of illustrative state statutes which would be invalidated under the rationale of the decision below is provided in the Appendix to this brief. *See infra*, p. 38.

Although Amicus New York Clearing House Association contends that state statutes which prohibit out-of-state corporations from providing fiduciary services in-state are not placed in jeopardy by the decision below (*see* Brief in Support of the Motion

STATEMENT

Bankers Trust New York Corporation ("BTNYC"), incorporated in New York State, is a "bank holding company" as defined in section 2(a) of the Bank Holding Company Act of 1956 ("1956 Act"), 12 U.S.C. § 1841(a) (1976). BTNYC organized and incorporated, under Delaware law, a wholly-owned subsidiary, BT Investment Managers, Inc. ("BTIM"), which subsequently qualified to do business in Florida.

Under section 4(c)(8) of the 1956 Act, a bank holding company like BTNYC must secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (1976). The Board of Governors, pursuant to its authority under the Bank Holding Company Act Amendments of 1970, § 103(4), 84 Stat. 1760, 1765, has determined that the performance of certain trust functions and the provision of investment or financial advice are such closely related activities. 12 C.F.R. §§ 225.4(a)(4) and 225.4(a)(5) (1979).[2]

to Affirm at 4, n.5), the constitutionality of such statutes is clearly within the purview of the decision below (*see* 461 F. Supp. at 1196) and the questions presented for review by this Court. *See* Appellant's Jur. St. at 4; Appellee's Motion to Affirm at 5.

[2] After the judgment below was entered, but before this appeal was filed, the United States Court of Appeals for the District of Columbia Circuit invalidated the regulation and interpretive ruling of the Board of Governors of the Federal Reserve System (12 C.F.R. §§ 225.4(a)(5)(ii), 225.125), insofar as they allowed bank holding companies to operate closed-end investment companies. The Court of Appeals concluded that Congress, in enacting and amending section 4(c)(8) of the Bank Holding Company Act, had not intended to permit bank holding companies to engage in such activities. *Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, —— F.2d ——, No. 77-1862 (D.C. Cir., March 30, 1979). The Board had earlier decided that bank holding companies could not be allowed to operate open-end investment companies. 12 C.F.R. § 225.125(f). Although the *Investment Company Institute* decision is not directly relevant to the issues presented in this case, its rationale calls into question the continued authority of the Federal Reserve Board to approve the provision of investment advisory services by bank holding companies such as BTNYC not only with respect to closed-end investment companies but to other types of business entities and persons as well. *See* slip. op. at 2, 39-40.

BTYNC applied to the Board of Governors for authorization to begin providing investment advisory services through BTIM in Palm Beach, Florida. Among the clients BTIM intended to serve were persons vacationing in Florida who normally relied on BTNYC to handle their investments and wished to obtain investment advice from a Florida office of the same company during the time they were away on vacation. 461 F. Supp. at 1195.

On April 26, 1973, the Board denied BTNYC's application. 59 Fed. Res. Bull. 364, 367 (1973). The Board indicated that, while it favored the application in principle, it was required to deny approval because of a 1972 amendment to the Florida Statutes section 659.141(1). While section 659.141(1) had previously prohibited out-of-state control of a Florida business which sold investment advisory services to Florida banks and trust companies, the 1972 amendment expanded this prohibition to include out-of-state control of a business that sells such services to any customer. Florida Statutes § 659.141(1) (1977); *see* 59 Fed. Res. Bull. at 366-67. In denying the application because of the Florida law, the Board specifically relied on section 7 of

the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, explaining that, ". . . section 7 of the Act expressly reserves to the States the authority to adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and effect of any such legislation." 59 Fed. Res. Bull. at 366.

BTNYC and its subsidiary BTIM then attacked the constitutionality of sections 659.141(1) and 660.10 of the Florida Statutes by bringing an action against the Comptroller of Florida in the federal district court for the Northern District of Florida. They sought declaratory and injunctive relief against the enforcement of both statutes.

The court initially abstained from construing the two Florida laws, pending interpretation of them by the Florida courts, but the United States Court of Appeals for the Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950 (5th Cir. 1977).

On remand, the entire factual record upon which the case was decided consisted of a stipulation of facts entered into by the Comptroller and BTNYC. This stipulation, dated May 11, 1978, states, *inter alia,* that but for the existence of the challenged statutes, BTNYC would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary trust company, in the activity of performing at a place of business in Florida one or

more functions that may be undertaken by a trust company under Florida law. 461 F. Supp. at 1193-94.

The three-judge district court held that both Florida statutes were *per se* unconstitutional under the Commerce Clause of the United States Constitution. 461 F. Supp. at 1196. The court further held that federal law did not permit Florida to enact the otherwise unconstitutional statutes. Specifically, the court held that section 7 of the 1956 Bank Holding Company Act, 12 U.S.C. § 1846 (1976), allowed the states only to continue regulating bank holding companies within the pre-existing scope of their constitutional authority and did not permit the states to extend that authority. 461 F. Supp. at 1199. The court also held that section 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), narrowly applied only to state laws governing holding company acquisitions of commercial banks and did not cover laws governing the acquisition of trust services or investment advisory services. 461 F. Supp. at 1199-1200.

The original judgment entered by the court below enjoined the Comptroller from enforcing against appellees the entire first sentence of section 659.141(1). However, by a later order dated March 22, 1979, the court amended its original judgment by excluding banks from the purview of the order. Consequently, the order, as finally amended, enjoins the Comptroller from enforcing section 659.141(1) both as to trust companies and investment advisory services but not as to banks. The court declined to grant a similar injunction against the enforcement of section 660.10 on the grounds that BTNYC had not yet attempted to establish a subsidiary trust service and that the grant of an injunction would therefore be premature. 461 F. Supp. at 1201.

Appellant filed a Notice of Appeal in the District Court of the Northern District of Florida on May 11, 1979, and on October 1, 1979, this Court noted probable jurisdiction.[3]

ARGUMENT

I. The Commerce Clause Does Not Invalidate Either of the Florida Statutes Held Unconstitutional by the Court Below.

A. Fiduciary and investment advisory services provided entirely in-state do not substantially affect interstate commerce and are therefore not within the purview of the Commerce Clause.

Article I, Section 8, Clause 3 of the Constitution gives Congress the "power . . . to regulate commerce . . . among the several states. . . ." This includes both a positive grant of power to Congress to regulate commerce and "negative implications" which limit state interference with interstate commerce. L. Tribe, *American Constitutional Law* § 6-2 at 320 (1978).

For purposes of applying the Commerce Clause, the definition of "interstate commerce," while broad, is not without limits.[4] As *United States* v. *Oregon State Medical Society,* 343 U.S. 326, makes clear, personal *services* provided on an *intrastate* basis which do not have a substantial effect on interstate commerce do not constitute "commerce among the several states" within the meaning of Article I, Section 8, Clause 3 of the United States Constitution. 343 U.S. at 338.

The present case presents a different situation from those typically presented to this Court for resolution under the negative implications of the Commerce Clause. Most cases in which this Court has struck down state regulations as violative of the Commerce Clause

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[3] While this case was pending below, and unknown to the court below, a subsidiary of BTNYC was authorized by the Division of Securities of Florida to conduct investment advisory services in Florida under the "grandfather" provisions of Florida Statutes section 659.141(3). This authorization is limited to "one office," and does not permit BTNYC to conduct investment advisory business in Florida generally or through any other subsidiary or office.

The judgment of the court below enjoined the Appellant "from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1)." This is the portion relating to trust services and investment advisory services. Appellant's Jur. St. at E3. Consequently, the injunction granted by the court below does effectively restrain the State of Florida from preventing the appellees from opening additional offices, or from organizing additional subsidiaries, for the purpose of conducting the investment advisory business or offering trust services in Florida. For this reason, the case is not moot, and this Court retains jurisdiction under 28 U.S.C. § 1253 to decide the question of the general constitutional validity of Florida Statutes section 659.141(1), and the related question of the constitutionality of Florida Statutes section 660.10.

[4] Until recently, it appeared that this Court employed a "two-tiered" definition of "commerce," in which the definition for purposes of assessing the reach of Congress' power to enact legislation was considerably broader than that employed for assessing the permissible scope of state legislation. *See, e.g., United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 544. It is clear now, however, that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727, 1731, n.2; *see Philadelphia* v. *New Jersey,* 437 U.S. 617, 622.

The Conference does not contend that the provision of fiduciary and investment advisory services is not "commerce"; it does contend, however, that these essentially local services do not substantially affect interstate commerce and therefore do not come within the purview of the Constitutional clause giving Congress power "to regulate commerce among the several states." *See infra,* at p. 9-12.

involve the movement of *goods* across state lines,[5] or restrictions placed on the instrumentalities used for transporting such goods.[6] In these cases it is a relatively straightforward matter to determine that interstate commerce is substantially affected by state regulations which impinge on or otherwise restrict the interstate movement of such goods.

This case arises in a different context, where the subject of commerce is not goods or the means of transporting those goods, but rather the provision of personal one-on-one services on a local basis.[7] In this case the nexus with interstate commerce is much less obvious than those in which the movement of goods is involved, and the judicial inquiry as to the substantiality of the nexus with interstate commerce is correspondingly more difficult. Consequently, proof of a substantial effect on interstate commerce is required, and

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[5] *See, e.g., Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727; *Philadelphia* v. *New Jersey,* 437 U.S. 617; *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333; *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366; *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137; *Dean Milk Co.* v. *Madison,* 340 U.S. 349; *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525. *Cf. Can Manufacturers Institute, Inc.* v. *Minnesota,* No. 371, slip op. at 8 (Minn. Sup. Ct., Sept. 7, 1979) (noting that in cases considering burdens on interstate commerce this Court has dealt largely with regulations that affect the transportation and flow of goods).

[6] *See, e.g., Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761.

[7] As the court below noted, "[t]he typical clients plaintiffs intend to serve in the Palm Beach office of BTIM are persons vacationing in Florida who during the bulk of the year rely on BTNYC to handle their investment portfolios and who would likely wish to obtain investment advice during vacation from a Florida office of the same company." 461 F. Supp at 1195.

not every incidental and remote effect will transform what is primarily a service rendered on "a local plane" into a service having a "substantial" effect on interstate commerce. *See* 343 U.S. at 339.

The "substantial effect" prerequisite has not been adequately established in this case for, as the court below noted, no direct evidence on that matter was ever presented to the court. 461 F. Supp. at 1195. Instead, the court below hypothesized that the necessary effect on interstate commerce was present because the persons to whom BTIM would provide investment advice would include persons who had crossed states lines to utilize those services; that providing investment advisory services would perforce affect stocks and bonds; and that the investment advisory services would involve the use of communications media which crossed state lines. 461 F. Supp. at 1195.

None of these incidents, however, is sufficient to constitute a substantial effect on interstate commerce. The movement of BTNYC's customers across state lines is not sufficient, for the "[m]ere movement of individuals from one state to another to use particular services does not convert those services into interstate services. . . ." *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors,* 521 F.2d 1343, 1346 (8th Cir. 1975); *see United States* v. *Oregon State Medical Society,* 343 U.S. at 338-39.[8] Nor is the possibility that

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[8] *See also United States* v. *Yellow Cab Co.,* 332 U.S. 218, 230; *Evanston Cab Co.* v. *Chicago,* 325 F.2d 907, 909-13 (7th Cir. 1963), *cert. denied,* 377 U.S. 943; *Elizabeth Hosp., Inc.* v. *Richardson,* 269 F.2d 167, 170-71 (8th Cir. 1959), *cert. denied,* 361 U.S. 884; *Hotel Phillips, Inc.* v. *Journeymen Barbers,* 195 F. Supp. 664, 667-69 (W.D. Mo. 1961)), *aff'd,* 301 F.2d 443 (8th Cir. 1962).

communications and financial transactions incident to those services may cross state lines dispositive, *see United States* v. *Oregon State Medical Society,* 343 U.S. at 339, and the court below made no attempt to show exactly how the provision of investment portfolio advice to individuals vacationing in Florida would impact or otherwise affect the interstate flow of stocks and bonds.

In short, not every intrastate activity which has an effect on interstate commerce will be transformed into "interstate commerce" for purposes of the Commerce Clause; those seeking to bring essentially intrastate services within the purview of the Commerce Clause must demonstrate that such services have a "substantial" effect on interstate commerce. In light of the lower court's acknowledgement that no direct evidence was presented on this question, it is difficult, if not impossible, to conclude that appellees' burden of proof on this element has been met. *See Hospital Building Co.* v. *Trustees of the Rex Hospital,* 425 U.S. 738, 747, n.5; *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors, supra,* 521 F.2d at 1347.[9]

[9] The lack of such evidence distinguishes this case from *Hospital Building Co.* v. *Trustees of the Rex Hospital,* 425 U.S. 738. That case arose on a motion to dismiss a complaint which, as this Court held, had alleged facts sufficient to establish the requisite effect on interstate commerce. 425 U.S. at 744. In this case, which went to trial on the basis of a stipulation of facts, no direct evidence on this question was presented to the court below, 461 F. Supp. at 1195, and the stipulation itself contained no facts addressed to this question.

B. Even if the provision of intrastate fiduciary and investment advisory services can be deemed to constitute interstate commerce within the purview of the Commerce Clause, Florida Statutes Sections 659.141(1) and 660.10 do not discriminate against or otherwise impermissibly burden "commerce . . . among the several states."

The delineation by this Court of the scope of permissible state regulation under the Commerce Clause is both evolutionary and dynamic for "[t]he cases defining the scope of permissible state regulation in areas of Congressional silence reflect an often controversial evolution of the rules to accommodate federal and state interests."[10] Consequently, ". . . the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated. . . ."[11]

Because of the continuing evolution of this Court's thinking in the difficult area of accommodating federal and state interests, we turn to the most recent guidelines developed by the Court. These guidelines, set forth in *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727, 1736, teach that several specific inquiries should be made in determining the scope of permissible state regulation under the Commerce Clause:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and, if so,

[10] *Hughes* v. *Oklahoma,* —— U.S. ——, ——, 99 S. Ct. 1727, 1736.

[11] *Pike* v. *Bruce Church, Inc.,* 397 U.S. at 142.

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Moreover, "the burden to show discrimination rests on the party challenging the validity of the statute. . . ." —— U.S. at ——, 99 S. Ct. at 1736. As will be shown below, appellee has not met this burden of proof under the applicable principles set forth in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117.

1. *Sections 659.141(1) and 660.10 of the Florida Statutes do not discriminate against interstate commerce.*

Appellee asserts that the statutes at issue in this case are blatantly discriminatory, and further asserts that a finding of such discrimination necessarily ends the Court's inquiry and itself justifies a finding of *per se* illegality. Motion to Affirm at 15-24. Neither of these contentions is correct under applicable principles recently enunciated by this Court.

Three recent decisions of this Court are particularly applicable to state statutes, such as those challenged in this case, that are alleged to discriminate against interstate commerce. *Philadelphia* v. *New Jersey,* 437 U.S. 617; *Hughes* v. *Oklahoma,* —— U.S. ——, 99 S. Ct. 1727; and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117.

Philadelphia v. *New Jersey* tested the constitutionality of a New Jersey statute and attendant regulations which banned the importation into New Jersey of virtually all solid and liquid waste. 437 U.S. at 618-19. This Court held the New Jersey legislation invalid because it had the effect of "overtly block[ing] the flow of interstate commerce at [the] State's borders," and further implied that such legislation could be subjected to a "virtually *per se* rule of invalidity." 437 U.S. at 624.

In *Hughes* v. *Oklahoma,* this Court again dealt with a state statute which blocked the flow of interstate commerce at the state's borders. The challenged statute there forbade the transportation of minnows out of state for sale. —— U.S. at ——, 99 S. Ct. at 1730. Although the statute in *Philadelphia* had the effect of keeping certain goods out of the state and the statute in *Hughes* had the effect of keeping a certain commodity inside the state, that difference was immaterial because the central objection in both cases was the same: both statutes in purpose and effect stopped the shipment of certain goods at the state's borders. 437 U.S. at 628. Furthermore, despite its finding that the statute in *Hughes was* discriminatory on its face, this Court did not end its inquiry there. While acknowledging that "facial discrimination *may* itself be a fatal defect . . ." (99 S. Ct. at 1737, emphasis added), this Court indicated that such facial discrimination did not *require per se* treatment, as appellee asserts it does. *See* Motion to Affirm at 27-28.

The rationale of the last case, *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (which the court below did not discuss or cite), is most relevant to the instant case. In *Exxon,* this Court considered a Maryland law which prohibited all producers and refiners of petroleum products from operating retail service stations in Maryland or from discriminating between customers providing certain price discounts. 437 U.S. at 119-20.

Because there were no producers or refiners of petroleum products in Maryland, the impact of the state law fell entirely on out-of-state refiners and producers, such as Exxon, that operated service stations in Maryland. As appellee does in this case (*see* Motion to Affirm at 15-18), Exxon argued that the effect of the statute was to protect in-state independent dealers from out-of-state competition and was therefore clearly protectionist. 437 U.S. at 125-27. This Court disagreed, noting that the statute did not *totally* block interstate marketers of petroleum from entering the Maryland market, because out-of-state independent dealers, who did not refine or produce gasoline, would continue to have full access to the Maryland market. The Court concluded that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." 437 U.S. at 126.

The reasoning in *Exxon* is fully applicable to this case. In contrast to the statutes at issue in *Hughes* and *Philadelphia,* the statute in *Exxon* did not prohibit the interstate movement of articles of commerce; rather, it had the effect of merely limiting the control of in-state outlets to certain types of interstate dealers. Similarly, in the instant case, the Florida statutes at issue do not prohibit the flow of fiduciary services into or out of Florida; rather, they, like the statute in *Exxon,* merely limit in-state outlets to local persons and specific types of out-of-state concerns. Under the principles set forth in *Exxon,* this limitation is permissible, for, as Mr. Justice Blackmun explained in his separate opinion, *Exxon* appears to require "... that discrimination must be universal to offend the Commerce Clause. ..."

437 U.S. at 147 (Blackmun, J., concurring in part and dissenting in part).

Moreover, an analysis of the challenged Florida statutes demonstrates that the *Exxon* principles apply directly to this case. Section 660.10 of the Florida Statutes prohibits the performance of certain fiduciary functions by all corporations except: (1) bank and trust companies incorporated in Florida and possessing trust powers; and (2) national banking associations located in Florida and possessing trust powers. Section 660.10 does not preclude all out-of-state entry into the Florida market, for the statute applies only to corporations. Out-of-state individuals or other non-corporate entities are free to organize and own a firm with Florida trust powers and to provide the fiduciary services enumerated in section 660.10 through that entity. Additionally, section 660.10 by itself does not preclude all out-of-state corporations from providing trust services in Florida; it merely requires such corporations to establish subsidiary Florida trust companies and to obtain trust powers from the state. Clearly, then, section 660.10 in and of itself does not prohibit all out-of-state entry into the Florida market as the court below concluded it did; [12] it merely limits the entry of certain

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[12] As amicus New York Clearing House Association apparently recognizes, the status of section 660.10 in this litigation is somewhat unclear. *See* Motion to Affirm at 3, n.4. Its contention is that it was the ***combination*** of section 659.141(1) and section 660.10 which precludes BTNYC and BTIM from providing trust services in Florida and that it was this joint statutory exclusion (and not the independent constitutionality of section 660.10) which was invalidated by the court below and is at issue here. *Id.*

Amicus' contention is not correct. Section 660.10 does not prohibit BTNYC from establishing a trust office subsidiary in Florida; only section 659.141(1) does that. The court, however,

specific types of entities that choose not to comply with Florida's legitimate requirements for providing trust services in-state. *See Railway Express Agency* v. *Virginia*, 282 U.S. 440, 444; *cf. Robertson* v. *California*, 328 U.S. 440, 459.

Similarly, section 659.141(1) of the Florida Statutes does not prevent the flow of investment advisory services provided by *all* out-of-state firms into Florida; it merely limits, as did the statute in *Exxon*, the *types* of out-of-state concerns that are allowed to provide such services in-state. By its terms, section 659.141(1) applies only to banks, holding companies and trust companies. Thus, section 659.141(1) would not appear to bar other types of out-of-state corporations (such as brokerage houses, or investment counsel, for example) from opening branch investment advisory offices in Florida.

Furthermore, a holding company organized in any state may operate an investment advisory service in Florida if its operations are principally conducted in Florida; conversely, a holding company incorporated in Florida may not operate such a service if its operations are principally conducted out-of-state. Consequently, section 659.141(1) does not distinguish on the basis of out-of-state *origin* as did the New Jersey statute in *Philadelphia* v. *New Jersey*, 437 U.S. at 627.

Finally, Section 659.141(3) contains "grandfather" provisions which enable certain holding companies whose principal operations are conducted outside Florida to open investment advisory offices in Florida. Indeed, it appears that a subsidiary of BTNYC opened an affiliate investment advisory office in Florida in mid-1978 under these "grandfather" provisions. *See supra*, at p. 8, n.3; *American Banker*, Oct. 2, 1979, at 15.

appeared to believe that the prohibition against BTNYC's establishment of a trust company was contained in section 660.10 and declared that section as well as section 659.141(1) unconstitutional.

In short, BTNYC and BTIM are in the same position as the plaintiffs were in *Exxon*: if section 659.141(1) is enforced against them, they may not be able to provide trust services and investment advisory services in Florida, but other out-of-state firms will be able to do so. Thus, the challenged Florida statutes do not discriminate against interstate commerce and the claims of BTNYC and BTIM must fail because, as this Court noted in *Exxon*, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-28, *citing Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806.

2. *Sections 659.141(1) and 660.10 of the Florida Statutes do not unduly burden interstate commerce.*

It is true that a state statute which does not discriminate against interstate commerce may still be invalid if it unduly burdens such commerce. However, in determining whether a state statute, even though nondiscriminatory, is unduly burdensome, the degree of burden placed on interstate commerce must be balanced against the local purposes served by the statute. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 768-69; *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371. Only if the burden on interstate commerce is clearly excessive in relation to the local benefits may the state statute be invalidated. *E.g., Aldens, Inc.* v. *LaFollette*,

552 F.2d 745, 749 (7th Cir. 1977), *cert. denied,* 434 U.S. 880.

The court below erroneously held that the two Florida statutes discriminated against interstate commerce and were, therefore, *per se* invalid. Consequently, the court below did not employ the balancing test required by *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137. In fact, application of that balancing test confirms the constitutionality of both statutes.

First, the burden on interstate commerce occasioned by the operation of the statutes is insubstantial, for, as noted previously, the statutes merely regulate the types of out-of-state concerns that may offer fiduciary and investment advisory services in Florida; they do not prohibit the entry of all out-of-state firms into the Florida market. Moreover, the Florida statutes and similar statutes in other states (*see* Appendix at p. 38, *infra*) embody legitimate state interests of long standing. Within our federal system, the legitimate interests of the state are not limited merely to public health and safety but rather extend to all matters which "protect the well-being and tranquility of a community," *Breard* v. *Alexandria,* 341 U.S. 622, 641, including the promotion of the local community's economic interests. Bikle, *The Silence of Congress,* 41 Harv. L. Rev. 200, 220 (1927); *see, e.g., Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 143; *Barbier* v. *Connolly,* 113 U.S. 27, 31.

Among the matters over which the states traditionally have been given broad authority are banking, *see Lewis* v. *Fidelity & Deposit Co.,* 292 U.S. 559; *Noble State Bank* v. *Haskell,* 219 U.S. 104, and related financial matters such as insurance, *see, e.g., Robertson* v. *California,* 328 U.S. 440; *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, and trust services, *American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313, 320 (D.S.C. 1974), *citing Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 153. Whereas other nations such as Canada and the United Kingdom have chosen centralized national banking structures comprised of only a few large banks regulated by the national government, the United States has chosen a decentralized scheme consisting of many banks, which are chartered and regulated by a dual system of national and state banking authorities. Indeed, the geographical expansion of banks in this country is controlled largely by *state* laws and *state* supervisory authorities, *see* 12 U.S.C. § 36(c) (1976). This statutory scheme recognizes that geographical expansion may lead to the increased economic expansion (and power) of certain banks, and embodies a national policy judgment that the states and not the federal government should determine what form the banking and related financial structures within their respective boundaries should assume, and the degree to which the concentration of economic power in certain financial institutions should be allowed. *See First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252; *St. Louis County National Bank* v. *Mercantile Trust Co. National Association,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909.

In this case, Florida has a legitimate interest in forestalling the entry of economically powerful out-of-state financial entities such as bank holding companies into the state of Florida, just as Maryland had a legitimate interest in limiting "the economic power of vertical integration" of petroleum dealers and refiners in Maryland, 437 U.S. at 142, and just as the state of Iowa

had a legitimate interest in forestalling the entry of economically powerful out-of-state bank holding companies into Iowa. *See Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288, 1294 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 875. This interest is, as appellant argued below (*see* 461 F. Supp. at 1214), based to a certain extent on the legitimate desire of the state to protect against undue economic concentration and thereby to encourage competition in the provision of investment advisory and fiduciary services. The state's interest is not confined to this important economic goal however. Statutes such as section 659.141(1) also serve to protect the public against unsound business practices because, as has been noted, state banking authorities have often found that it is difficult to obtain adequate control over out-of-state bank holding companies, many of which are too large and too far-flung to be regulated properly. 511 F.2d at 1294; G. Fisher, *Bank Holding Companies* 9 (1961).

Furthermore, an important social goal is also served by statutes such as section 659.141(1), for the state has a legitimate interest in furthering local control over important local industries such as banks and related financial services because of the positive impact such local control has on the level of civic involvement and related lifestyle values. *See, e.g., Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on other grounds,* —— U.S. ——, 99 S. Ct. 2710; *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 61, 153 N.E.2d 806, 809 (1958), *appeal dismissed,* 359 U.S. 311. A locally-controlled business has a stake in the future of the community. Policies are set with local conditions and needs in mind; and those occupying positions of importance in local businesses such as banks and

trust companies often give freely both of their time and money to improve the communities in which they are located.

In contrast, a large bank holding company such as BTNYC, which is controlled from afar and has its principal operations elsewhere, has little stake in the local community. In essence it is an absentee landlord concerned primarily with the profitability of its scattered enterprises. The management personnel selected for those enterprises usually will not be local individuals but rather persons brought in from outside the community by the parent corporation; and policies will be set, not with local needs or circumstances in mind, but rather in accord with the financial objectives of a far-flung conglomerate. As noted by the court in *Great Western United Corp.,* the presence of "benevolent management" is a legitimate state interest, 577 F.2d at 1283, and, as indicated in the debates on the 1956 Act, this interest was at least one factor motivating passage of the Act. *See* 101 Cong. Rec. 8021 (1955).

In short, the public policy rationale relied upon by this Court so many years ago in upholding, under the privileges and immunities clause, the right of the states to exclude and otherwise restrict the activities of foreign corporations within their borders, applies with equal force to the present case.

> . . . At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. *And if, when composed of citizens of one State, their corporate powers and franchises could be*

> *exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other states.* [*Paul* v. *Virginia*, 8 Wallace 168, 181-82, emphasis added.]

Like Virginia in *Paul*, Florida in this case is simply attempting to forestall widespread foreign control of certain fiduciary and financial services that are of central concern to the economic and social good of the state's communities and citizens.[13]

The nature of the specific services regulated by the Florida statutes further confirms the appropriateness of deferring to state control in this case. Section 660.10 prohibits certain out-of-state corporations from exercising certain fiduciary functions, including those of executor or administrator of an estate, those of guardian, and those of trustee. Congress has never itself sought to regulate these essentially "local" matters; to the contrary, it has indicated its intent to defer to state law in this area.[14] In short, section 660.10 governs an area traditionally left to the control and regulation

[13] *See* 2 Scott, *The Law of Trusts*, § 96.6 (3d ed. 1967). Scott indicates that the constitutionality of state statutes prohibiting banks or trust companies organized under the laws of another state from administering trusts within their respective borders is based primarily on the precedent established in *Paul* v. *Virginia*.

[14] *Blaney* v. *Florida National Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *see* 12 U.S.C. § 92a(a) (1976) which authorizes the Comptroller of the Currency to permit national banks to provide fiduciary services only "when not in contravention of State or local law" and only to the extent that State banks, trust companies, or other corporations which come into competition with national banks are permitted to provide such services under state law. *See also First National Bank of Bay City* v. *Union Trust Co.*, 244 U.S. 416, 427-28.

of the states. *See, e.g., Labine* v. *Vincent*, 401 U.S. 532, 538; *American Trust Co.* v. *South Carolina State Board of Bank Control, supra*, 381 F. Supp. at 320; *In re Estate of Scott*, 418 Pa. 332, 211 A.2d 429, 431 (1965); 1 Scott, *The Law of Trusts* § 1.11 at 31 (3d ed. 1967).

Many states have sought to regulate the provision of fiduciary services in-state by enacting statutes similar to section 660.10 which, to various degrees, restrict the eligibility of non-resident individuals and foreign corporations to exercise fiduciary functions such as those of executor, administrator or trustee. Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis*, 37 Va. L. Rev. 1119 (1951); *see* Annot., *Eligibility of Foreign Corporations to Appointment as Executor, Administrator, or Testamentary Trustee*, 26 A.L.R.3d 1019, 1026-29 (1969); Annot., *Eligibility of Foreign Corporations to Appointment as Trustee of Inter Vivos Trust*, 82 A.L.R.2d 946, 946 n.1 (1962); 2 Scott, *The Law of Trusts* § 96.6 (3d ed. 1967); 5 Scott, *The Law of Trusts* § 558 (3d ed. 1967).[15] Most of these state statutes, like section 660.10,

[15] These statutory prohibitions vary greatly from state to state. The observation made in 1944 by one well known authority in the trust field is equally applicable today:

> . . . Some states expressly prohibit out-of-state trust institutions from serving in any fiduciary capacity; others permit them to serve in only certain named capacities. Some states, known as the reciprocal states, provide that out-of-state trust institutions may serve in any capacity in which the state in which those institutions are located permits trust institutions of the other state to serve; some of these states name the capacities as to which they reciprocate with other states. Some states say they admit out-of-state trust institutions to serve in all fiduciary capacities; others, in certain named capacities; but, then, these states forthwith restrict this privilege by prescribing as a condition precedent that out-of-state trust institutions first must qualify as foreign corporations to do business in the state. Some of these states make it easy and inex-

have been in effect for many years, and help ensure that those entrusted with performing fiduciary duties on behalf of the state's citizens are thoroughly familiar with the local laws governing those duties. *See American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. at 319. *See also Fennell* v. *Monongahela Power Co.*, 350 F.2d 867, 869 (4th Cir. 1965).

Similarly, section 659.141(1), which governs the control of investment advisory services, regulates an area of legitimate state interest. Professor Loss has reported that in 1961, 22 states regulated investment advisers; by 1969, the total had increased to 29. 1 L. Loss, *Securities Regulation* 47 (1961); 4 L. Loss, *Securities Regulation* 2219 (1969). *See also Marketlines, Inc.* v. *Chamberlain,* 63 Ill. App. 2d 274, 211 N.E.2d 399, 402 (1965).

Furthermore, Congress recognized the states' legitimate interest in regulating these services when it provided in the 1960 Amendments to the Investment Advisers Act of 1940, Pub. L. No. 86-750, § 16, 74 Stat. 885, 888, that

> [n]othing in [that act] shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State

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pensive, others difficult, if not impossible, for out-of-state trust institutions to qualify to do business. Some states draw a distinction between the right of out-of-state trust institutions to serve residents and their right to serve non-residents in fiduciary capacities. Still other states have no direct or express law on the subject, either legislative or judicial; and, in the absence of statute or judicial decision, succeeding Attorney Generals of the state have given conflicting opinions.

Stephenson, "Rights of Out-of-State Trust Institutions," 16 *Studies In Trust Business,* 2d Series 335 (1944), quoted in Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis, supra,* 37 Va. L. Rev. at 1127-28.

> over any security or any person insofar as it does not conflict with the provisions of this subchapter or the rules and regulations thereunder. [15 U.S.C. § 80b-18a (1976)].

As noted in the Senate Report on the 1960 Amendments to the Act, this section was intended to "express clearly the [states'] concurrent jurisdiction in the area of investment advisers, in view of the important role which State authorities must play in the supervision of securities." S. Rep. No. 1760, 86th Cong., 2d Sess. 9 (1960), *reprinted in* 1960 U.S. Code Cong. & Ad. News 3502, 3511. Thus, as Congress recognized in enacting the 1960 Amendments,[16] the state government has a legitimate state interest in regulating the provision of investment advisory services for the benefit and protection of its citizenry, and this interest must be upheld unless the state regulation actually conflicts with the federal statutory scheme or the regulations promulgated thereunder. *See* 15 U.S.C. § 80b-18a (1976). Because section 659.141(1) in no way conflicts with the federal regulation of investment advisers (*see* 15 U.S.C. §§ 80b-1 *et. seq.* (1976); 17 C.F.R. §§ 275 *et. seq.* (1979)), it should be upheld as a valid exercise of Florida's police powers.

In short, Florida has longstanding and legitimate state interests in both of the areas regulated by sections 660.10 and 659.141(1) of the Florida Statutes: these interests are not outweighed by the insubstantial burden on interstate commerce which the statutes impose;

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[16] As this Court made clear in *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, Congressional recognition that a particular matter is "peculiarly a matter of state and local concern" is an important factor to be taken into consideration in determining the appropriate accommodation of state and federal interests. 362 U.S. at 446.

and, given the nature of the interests protected, no viable alternatives for protecting these interests are available.

II. Sections 3(d) and 7 of the Bank Holding Company Act of 1956 Permit the States to Adopt Laws Similar to the Florida Statutes Struck Down by the Court Below.

"It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens on it." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 315. This Court has long recognized that Congress may permit states to impose restrictions upon interstate commerce in order to implement important state policies. *Kentucky Whip & Collar Co.* v. *I.C.R. Co.,* 299 U.S. 334. Thus, even if both Florida Statutes were found to burden interstate commerce to an extent which would otherwise be impermissible, they should nevertheless be upheld if Congress authorized Florida to enact such laws.

Congress has authorized the Florida statutes here at issue under sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1842(d) and 1846. These Florida statutes seek to regulate the in-state activities of fiduciary offices controlled by bank holding companies, and sections 3(d) and 7 authorize the states to enact such laws in order to preserve significant state regulatory interests in the area of fiduciary services.

Section 3(d) prohibits the Federal Reserve Board from approving an application by a bank holding company to acquire "any additional bank" located outside the state in which the holding company conducts its principal operations, unless the acquisition "is specifically authorized by the statute laws of the State in which the bank is located," expressly and not impliedly. 12 U.S.C. § 1842(d) (1976). The court below concluded that while section 3(d) allows restrictive state legislation affecting commercial banks operated by holding companies, it does not authorize the states to enact laws limiting fiduciary offices established by such companies. In reaching this conclusion, the court held that the clause "any additional bank" in section 3(d) must be construed narrowly by applying the literal definition of "bank" in section 2(c) of the Act, as amended in 1970, which defines "bank" to include those institutions which "(1) accept deposits that the depositor has a legal right to withdraw on demand, and (2) engage in the business of making commercial loans." 461 F. Supp. at 1200; *see* Bank Holding Company Act of 1956, § 2 (c), as amended, 12 U.S.C. § 1841(c) (1976).

The court's construction of section 3(d) was erroneous, because it ignored the interrelated legislative histories of sections 2(c) and 3(d), which show that Congress did *not* intend section 3(d) to apply only to the narrow class of financial institutions that accept demand deposits and make commercial loans. Section 3 (d) was added to the 1956 Act by an amendment sponsored by Senator Douglas. *See* 102 Cong. Rec. 6750-58, 6854-62 (1956). At the time Senator Douglas introduced the amendment to S. 2577, the term "bank" was defined broadly to include "any National banking association or any State bank, savings bank, *or trust company* . . . ." *See* S. 2577, 84th Cong., 1st Sess. § 2(c) (emphasis added). This broad definition was retained in the Act as finally passed. *See* Pub. L. No. 511, § 2(c), 70 Stat. 133 (1956). It was not until several years later that section 2(c) was amended so as to refer

only to institutions that accept demand deposits and make commercial loans.[17] Thus, at the time Congress considered and passed the Douglas amendment in 1956, the meaning accorded the term "bank" was intended to include fiduciary offices such as the proposed trust office of BTNYC, and it is this original meaning which must be considered in determining the scope of section 3(d). This the court below did not do.

Moreover, section 3(d) must be given a broad construction in order to preserve competitive equality between state and national banks. In section 3(d), as in other federal banking statutes, Congress has expressed an intent to foster competitive equality through deference to state regulatory standards and has mandated a liberal construction of these statutes to implement this intent. For example, in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. at 261, this Court held that section 7 of the McFadden Act, as amended, 12 U.S.C. § 36, which governs branching by national banks, embodies a Congressional policy in favor of competitive equality and therefore permits national banks to branch only if and to the extent that state banks are authorized to branch under the laws of the relevant states. And this Court later held that section 36 must be construed liberally in order to ensure competitive equality. *First National Bank in Plant*

[17] The definition of "bank" was partially amended in 1966 when the terminology "any institution that accepts deposits that the depositor has a legal right to withdraw on demand" was substituted for "any national banking institution or any state bank, savings bank, or trust company." Pub. L. No. 89-485, § 3(c), 80 Stat. 236. Then, in 1970, the provision was once again amended by adding the requirement that an institution, to be defined as a "bank," must also make commercial loans. Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1762 (1970).

City v. *Dickinson*, 396 U.S. 122, 135-38. Similarly, Congress expressed its intention to preserve competitive equality in the area of trust operations in 12 U.S.C. § 92a, which permits national banks to exercise only those trust powers which state-chartered institutions may discharge under state law. *See, e.g., St. Louis County National Bank* v. *Mercantile Trust Co. National Association*, 548 F.2d at 720; *Blaney* v. *Florida National Bank*, 357 F.2d at 30.

In fact, as *amicus* New York Clearing House Association recognizes,[18] one of Congress' reasons for enacting section 3(d) was to prevent national banks from employing the device of bank holding companies to evade the state law branching restrictions incorporated in section 36 and thereby undermine competitive equality.[19] Thus, section 3(d), like sections 36 and 92a, must be interpreted broadly to reach fiduciary institutions operated by bank holding companies. Otherwise, national banks could gain a prohibited competitive advantage over state banks by having their holding companies establish numerous fiduciary subsidiaries across state lines without regard to the state law restrictions binding upon state banks.

The recent decision of the Eighth Circuit Court of Appeals in *Mercantile Trust Co.* illustrates the broad approach which should be applied in the case of section 3(d) in order to preserve competitive equality. In that case, St. Louis County National Bank sought a declaratory judgment that a branch trust office established by Mercantile Trust was illegal under 12 U.S.C. §§ 36(c)

[18] *See* Brief in Support of the Motion to Affirm at 11, n.12.

[19] *See, e.g.*, 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas); H.R. Rep. No. 609, 84th Cong., 1st Sess. 24 (1955).

and 92a, because Missouri state law did not authorize state banks to establish such offices. 548 F.2d at 717. Mercantile Trust argued, *inter alia*, that the trust office was not a branch within the meaning of section 36(f) because no deposits were received, or checks paid, or money lent at the trust office, within the literal terms of the federal statute. 548 F.2d at 717-18. The Eighth Circuit, however (unlike the court below in construing section 3(d)), refused to give section 36(f) such a restrictive reading. Relying heavily on the precedent established by this Court in *Plant City* and emphasizing the importance of defining "branch" so as to give full effect to the policy objective of promoting "competitive equality" between state and national banks, the Eighth Circuit concluded that "the three routine banking functions delineated in section 36(f) are not the only indicia of branch banking," and that "branch" therefore could not be accorded the narrow, restrictive meaning urged by appellee. 548 F.2d at 719. Instead, the Eighth Circuit held that the trust office was a "branch" because it conducted transactions generally carried on at the bank's main office, and because section 36(f) was clearly intended by Congress to embrace offices performing such transactions. 548 F.2d at 719-20.

An approach similar to that of *Mercantile Trust Co.* should have been taken by the court below in construing section 3(d). Like the trust office found to be a "branch" in *Mercantile Trust Co.*, BTNYC's proposed office was designed to conduct transactions within the general business of national banks. Congress manifestly intended section 3(d) to cover such offices, because their operation would constitute a type of banking business which must be subjected to state regulation in order to

guarantee competitive equality between state and national banks. Otherwise, national bank holding companies could establish interstate networks of fiduciary offices forbidden to state banks under state law, and thereby confer upon their subsidiary national banks greater economic backing and a resulting competitive advantage over state banks. In short, sections 659.141 (1) and 660.10 are clearly authorized by section 3(d), because they simply seek to regulate the conduct of a species of banking business by additional offices of bank holding companies.

The second provision of the 1956 Bank Holding Company Act that authorizes sections 659.141(1) and 660.10 is section 7, which reads:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 U.S.C. § 1846 (1976)].

To determine the appropriate scope and meaning of this provision, it is necessary to determine what powers and jurisdiction the states possessed in 1956 or thereafter acquired, for it has long been recognized that section 7 enables states to place much greater restrictions on bank holding companies than those that would otherwise apply under the 1956 Act.[20]

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[20] 102 Cong. Rec. 6751 (1956); P. Heller, *Handbook of Federal Bank Holding Company Law* 45-46 (1976); *see, e.g., Braeburn Securities Corp.* v. *Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311.

One power the states clearly retain under section 7 is the power to prohibit the formation of bank holding companies and to exclude all bank holding companies from their boundaries. *See Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, n.5; 102 Cong. Rec. 6752 (1956). Yet such total bans clearly burden interstate commerce considerably more than do lesser restrictions such as those contained in the Florida statutes.

In enacting section 7, Congress also intended to protect and preserve all the powers the states already possessed or would acquire in order "to preserve the dual system of National and State banks." 102 Cong. Rec. 6758 (1956). The preservation of this dual banking system is, in turn, dependent on the states' ability to ensure "competitive equality" between their respective state banks and national banking institutions. *See First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122; *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252. As noted above, Congress has enacted 12 U.S.C. § 36, which subjects national banks to the same branching restrictions as those imposed on state banks, and 12 U.S.C. § 92a, which allows national banks to perform only those fiduciary functions permitted to state-chartered institutions. At the heart of both statutes is Congress' recognition that the dual banking system cannot survive unless competitive equality is preserved between state banking institutions and national banking institutions.[21]

[21] *See First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261; *Blaney* v. *Florida Nat'l Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313, 323 (D.S.C. 1974); *New Hampshire Bankers Ass'n* v. *Nelson*, 336 F. Supp. 1330, 1334 (D.N.H.), *aff'd*, 460 F.2d 307 (1st Cir. 1972), *cert. denied*, 409 U.S. 1001.

As illustrated by *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313 (D.S.C. 1974), it is Congress' policy in favor of competitive equality which must remain paramount in determining the scope of section 7 and the consequent constitutionality of state laws such as sections 659.141 (1) and 660.10. In *American Trust Co.*, the plaintiff, a North Carolina bank holding company, formed a South Carolina corporation to transact trust business in South Carolina. However, the plaintiff's subsidiary was barred from transacting such business by a South Carolina statute which prohibited domestic corporations controlled by corporations domiciled or licensed in states contiguous to South Carolina from serving as testamentary trustees. The court held the statute unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, but it also held that the statute did *not* violate the Commerce Clause or the Supremacy Clause of the United States Constitution, reasoning that 12 U.S.C. § 92a provides that a national bank may act as a fiduciary only "when not in contravention of state or local law," and that Congress' enactment of section 92a therefore permitted South Carolina to pass the challenged statute. The court concluded that the statute did not impose an impermissible burden on interstate commerce because the ban operated equally against state and national banks located in North Carolina and thereby preserved competitive equality. 381 F. Supp. at 323. The court also considered the constitutionality of a companion statute which required a bank holding company subsidiary to obtain approval from the State Board of Bank Control before commencing business. The plaintiff contended that the statute would be used to exclude it from transact-

ing trust business in South Carolina. The court, however, rejected plaintiff's contention that the statute burdened interstate commerce, holding, in effect, that section 7, in combination with section 92a, allowed such state regulation. 381 F. Supp. at 324.

The emphasis on assuring "competitive equality" between state and national banking institutions, which was of paramount importance in analyzing the challenged state statutes in *American Trust Co.*, is equally applicable to this case. The challenged Florida statutes, like those of South Carolina, do not discriminate between out-of-state national banking institutions and state banks or otherwise undermine the policy of encouraging competitive equality between these two classes of institutions. However, if the decision below is allowed to stand, the policy of ensuring "competitive equality" between state and national banking institutions will, in fact, be frustrated. As illustrated by *Mercantile Trust Co.*, 548 F.2d 716, national banks should not be permitted to establish branch offices for providing trust services where state banks cannot do so under state law. If the decision below is allowed to stand, the underlying policy of "competitive equality" will be circumvented because national bank holding companies will be given free rein to establish as many trust offices across state lines as they wish and, thereby, give their subsidiary national banks increased economic resources and an unlawful competitive advantage over state banks which are precluded from establishing any branch offices for providing fiduciary services.

In short, because the bank holding company is a favorite device for circumventing restrictive state branching laws, *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d at

1291, *Braeburn Securities Corp.* v. *Smith*, 15 Ill.2d at 61-62, 153 N.E.2d at 810, Congress enacted section 7 in order to permit the states to place limitations on holding company activities. Florida Statutes sections 659.141 (1) and 660.10 simply seek to prevent BTNYC from operating facilities which would not be permitted to state banks under similar circumstances. Thus, the challenged statutes are authorized by section 7 of the 1956 Act. *See American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. at 324.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the court below.

Respectfully submitted,

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November, 1979

APPENDIX

The rationale of the decision of the court below could place a significant number of other state statutes in jeopardy, including:

1) Ill. Ann. Stat. ch. 32, § 157.102 (Smith-Hurd 1954)
2) Kansas Stat. Ann. §§ 59-1701, 59-1702 (1976)
3) Ky. Rev. Stat. Ann. § 287.030(2) (1978 cum. supp.)
4) Minn. Stat. Ann. §§ 303.04, 303.25 (West 1969)
5) N.C. Gen. Stat. § 55-132(b) (1975)
6) Or. Rev. Stat. § 715.025
7) Pa. Stat. Ann. tit. 7, § 106(b) (Purdon 1978-79 cum. supp.)
8) Tex. Prob. Code Ann. tit. 17A, § 105A(c) (Vernon 1978-79 cum. supp.)
9) Va. Code § 6.1-5. (1979)
10) W. Va. Code § 44-5-3 (1979 cum. supp.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA, AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, *Appellant*,

v.

BT INVESTMENT MANAGERS, INC., ET AL., *Appellees*.

On Appeal From the United States District Court for the Northern District of Florida

BRIEF IN SUPPORT OF APPELLANT OF FLORIDA BANKERS ASSOCIATION AS AMICUS CURIAE

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One Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. at 9, 21 (1970) 13

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BRIEF IN SUPPORT OF APPELLANT OF FLORIDA BANKERS ASSOCIATION AS AMICUS CURIAE

This brief is filed under Rule 42(2) of the Rules of this Court, with consent of all parties to the case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Bankers Association has appeared as Amicus Curiae in this proceeding because its membership will be both directly and indirectly affected by

this Court's determinations. The Florida Bankers Association is the one organization in the State of Florida which represents principally all banking interests. As a part of its activities, the Association has long maintained an interest in the status of laws and regulations governing banking and financial institutions. The Association feels that because of both its status as representative of Florida banks and its experience and knowledge of the regulatory scheme governing Florida banking, it is in a position to provide assistance to the Court in considering the issues presented.

ARGUMENT

Introduction: The Historical Perspective

This is a case of first impression dealing with the most fundamental controls placed on the accumulation of economic power by bank holding companies under the banking laws of this country. The simply stated issue is whether the Commerce Clause of the United States Constitution prohibits the Florida Legislature from restricting bank holding companies from expanding across state lines into Florida by means of subsidiary investment advisory companies and trust companies. At stake in this case is the geographic extent to which bank holding companies are allowed to spin a web of financial subsidiaries capable of concentrating and exercising vast economic power within every community.

A brief historical review shows why such a fundamental issue is now being litigated. Since the founding of the nation, a great debate has existed between those favoring a centralized banking system in the nature of european models, and those favoring a decentralized system regulated principally by the several states. Not

infrequently, this great debate has made its way to the halls of the Court. For example, in *McCullough* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), the efforts of states to tax the nationally chartered banks out of existence was rebuffed.

After a century of experimentation, the Congress in 1927 reached one of the great compromises of American history. In order to preserve the major benefits of centralization without sacrificing the benefits of local controls over financial institutions, the Congress enacted the McFadden Act, 12 U.S.C. § 36. The purpose of the McFadden Act was to broaden the generally inferior powers of national banks as compared to state banks, while guaranteeing competitive equality within the uniquely American dual system of banking. It did so in major part by permitting national banks to branch, but only to the extent state law permitted state banks to do so. Moreover, interstate branching was prohibited, as the grant of the power to branch contained in 12 U.S.C. § 36(c) was limited to the states wherein the national bank was "situated". The legislative history of the McFadden Act is recounted in the opinion of the Court in *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966). The limitations on branching contained in the laws of most states, and made applicable to national banks through the McFadden Act, led to a phenomenal growth in bank holding companies. By creating a corporation to own multiple banks, it was possible to avoid branching limitations. See generally, Savage, *A History of the Bank Holding Company Movement: 1900-1978,* in Staff of the Board of Governors, Federal Reserve System, The Bank Holding Company Movement to 1978: A Compendium § 2, at 6 (Apr.12,1978). Congressional fears

regarding the ability of holding companies to evade regulation and to accumulate vast economic power through combining control of banks with control of non-bank commercial enterprises resulted in the enactment of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq. See *Alabama Ass'n of Ins. Agents* v. *Board of Governors,* 533 F. 2d 224, 231 (5th Cir. 1976); Wallach, *Section 4(c)(6) of the Bank Holding Company Act: Chink in the Armor,* 94 Banking L. J. 525 (1977). To achieve its purpose, Congress required holding companies to obtain approval of the Board of Governors for acquisitions, and prohibited holding companies from engaging in non-banking business directly or through subsidiaries. The only relevant exception was that a holding company could own a company whose business was of a "financial fiduciary or insurance nature" and "so closely related to the business of banking as to be a proper incident thereto." The Act further prohibited expansion of a bank holding company beyond the boundaries of the state in which it maintained its principal place of business or conducted its principal operations.

These organic and geographic restraints on the accumulation of power by bank holding companies were recognized, moreover, to be only minimum restraints. The important interest of the individual states in retaining their control over financial institutions operating within their borders persuaded Congress that it was essential to preserve state powers within the dual system of regulation. Thus, 12 U.S.C. § 1846 provides:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Pursuant to this reservation of sovereign powers, states have acted to regulate bank holding companies more stringently than federal law, including prohibition of bank holding companies from doing business. *Opinion of the Justices,* 151 A. 2d 236 (N.H. 1959); *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed* 359 U.S. 311 (1959); *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.,* 81 N.E. 2d 553 (Mass. 1948).

In 1966, Congress further limited the opportunities for geographic expansion of bank holding companies by amending § 1842 to eliminate the option of expanding either within the state in which the principal office was maintained, or the state in which principal operations were conducted. Act of July 1, 1966, § 7(d), 80 Stat. 236, 238. With passage of the 1966 Amendments, a bank holding company was limited to expanding within the boundaries of the state wherein the greater share of its deposits was sited as of July 1, 1966, or upon becoming a holding company. Moreover, the power of the states was strengthened. Without the optional choice existing previously, there could be no interstate expansion unless the state into which the holding company desired entry expressly authorized such entry by statute "and not merely by implication".

Although the Holding Company Act expressly referred only to interstate acquisition of banking subsidiaries, the effect was to bar substantially all interstate acquisitions. In order for a non-bank to be "closely related to the business of banking", and thus subject to being acquired, its activities had to be di-

rectly and significantly connected to the existing banking operations of the holding company. See *National Courier Ass'n* v. *Board of Governors,* 516 F. 2d 1229, 1235-37 (D.C. Cir. 1975). Thus, the interstate expansion prohibition, commonly known as the Douglas Amendment, effectively prohibited interstate acquisition of both banks and non-banks.

In 1970, the Act was amended to bring bank holding companies owning a single bank within the limitations of the Act, and § 1843(c)(8) was amended to specifically state criteria which a holding company's acquisition of a company had to meet to gain approval of the Board of Governors, in addition to being "so closely related to banking or managing or controlling banks as to be a proper incident thereto". As the District of Columbia Circuit Court of Appeals explained in *Investment Company Institute* v. *Board of Governors,* —— F.2d ——, Case No. 77-1862 (D.C. Cir. Opinion of March 30, 1979), the "closely related" language of § 1843(c)(8) was amended in 1970 to substitute the phrase "closely related to banking" for the phrase "closely related to the business of banking". The purpose of this minor language change was simply to allow bank holding companies to acquire subsidiaries doing types of business generally engaged in by banks without requiring that the existing subsidiaries already be engaged in the particular activity. Although nothing in the legislative history suggests a congressional desire to allow interstate ownership of subsidiaries, holding companies were for the first time able to seize upon an arguable gap in the Congressional prohibition of interstate ownership.

Bankers Trust New York Corporation attempted to take advantage of this arguable gap by forming a subsidiary, BT Investment Managers, Inc., to get approval of the Board of Governors for expansion across state boundaries. Acting pursuant to 12 U.S.C. § 1846, which reserves to the several states their full sovereign powers with respect to "banks, bank holding companies, *and subsidiaries thereof",* the Florida Legislature enacted § 659.141(1), Florida Statutes, to halt the evasion of the historical policy of limiting the concentration of economic power in holding companies and restricting interstate expansion as expressed in the McFadden Act and the Douglas Amendment to the Bank Holding Company Act, and to uphold the like public policy of the State of Florida.

I.

The Negative Implications Of The Commerce Clause Do Not Invalidate State Regulation Of The Ownership Of Financial Institutions Consistent With Congressional Policy And Limited To Intrastate Economic Activity.

In declaring § 659.141(1), Florida Statutes, unconstitutional under the Commerce Clause, the district court ruled that the statute was *per se* unconstitutional as raising a protectionist barrier to commerce. The district court based its decision on the decision of the Court in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). It is submitted, however, that the district court misread that decision.

The *Philadelphia* decision is one of a long series of decisions holding that the states can not erect barriers to the interstate flow of commerce. The real issue in the case was whether garbage was an item of commerce. Quite clearly, if it was an item of commerce, free movement across state lines could not be wholly barred to advance a parochial interest. The district court erred

by interpreting the *Philadelphia* decision to mean that practically any effect on interstate commerce condemns a state law, rather than viewing the decision as an application of the meaning of the term "commerce" to a particular article which had been wholly barred from crossing the state boundary.

The district court's error arises from the failure to give proper weight to the decision in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). In that case the Court was concerned with a Maryland statute prohibiting refiners and producers of petroleum products from owning outlets for the retail sale of such products. Although the regulation affected only out-of-state interstate companies, the Court upheld the statute under the Commerce Clause because it did not discriminate against interstate commerce, but only as to certain interstate firms. The decision recognized that under the Commerce Clause the relevant concern is not the wisdom of a state's laws, but the constitutional concern for borders open to the flow of commerce.

The present case is closely analogous to *Exxon.* Section 659.141, Florida Statutes, does not discriminate against an interstate flow of commerce. It is not at all concerned with closing the borders of Florida to financial services provided by firms in other states. Banks, bank holding companies and trust companies are free under the statute to engage in any activity they may desire on an interstate basis, including the provision of investment advisory services. The use of telephone and other electronic communication is unaffected. The use of the mail is untouched. Travel into Florida is of no statutory concern. The prohibition of the statute is aimed solely at particular types of business entities

owning or controlling banks, trust companies and investment advisory companies having offices in Florida and doing an intrastate business.

The legislative intent to regulate only intrastate activity permeates the statute. The statutory prohibition is of ownership or control of

> "Any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or . . . any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state."

The acquisition of stock in banks, trust companies or investment advisory businesses is not entirely prohibited. Only controlling interests are prohibited. Moreover, the statute expressly exempts situations which might arise in the course of doing business interstate. Stock in the regulated types of enterprises can be generally acquired in a fiduciary capacity, or in connection with the underwriting of an issuance of securities, or in connection with the collection of a debt. Interstate transactions are not the concern of the statute.

By limiting the application of § 659.141 to ownership or control of companies with intrastate offices, exempting ownership of stock arising out of normally occurring business transactions, and exempting activities of an interstate nature, the Florida Legislature has acted in a manner fully consistent with the Commerce Clause of the United States Constitution. See *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.,* 366 U.S. 276 (1961). The principle that a corporation of one state may enter into all other states of the union for purposes of interstate commerce is in no manner abridged. Section 659.141

is aimed solely at the ownership of an intrastate office from which intrastate activities are undertaken. Compare *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), with *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U.S. 282 (1921), and *York Manufacturing Co.* v. *Colley,* 247 U.S. 21 (1918).

In regard to § 659.141, only one factor exists in the present case different from the circumstances on which *Exxon* was decided. The Florida statute prohibits the acquisition of control over the regulated enterprises by banks, trust companies and bank holding companies whose operations are principally conducted outside of Florida. In *Exxon,* there were no intrastate producers or refiners of petroleum products. This difference is not of significance in the application of Commerce Clause principles, however.

The statute does not prohibit control of the regulated enterprises from outside of Florida. Any person, natural or corporate, can own or control the regulated enterprises without regard to state of residence, except the three types of corporate entities to which the statute is directed. Moreover, Florida banks, trust companies and bank holding companies are not exempt from the statute. All such Florida institutions whose operations are conducted principally outside of Florida are barred from controlling or acquiring any of the regulated enterprises. The "grandfather" provisions of the statute, § 659.141(3) (d)-(h), also apply equally to Florida and non-Florida institutions. The statute is evenhanded in its sanctions.

As in *Exxon,* no market is cordoned off and no one is insulated from competition. The goal of the statute is not an impermissible one. To the contrary, the statute seeks to supplement the congressionally declared national policy against interstate bank branching and concentration of economic power. The distinction drawn by § 659.141 is the same as that which Congress has drawn in 12 U.S.C. § 1842(d), and promotes the very policies motivating the McFadden Act and the Douglas Amendment to the Bank Holding Company Act. Expression by Florida of a limitation on the entry of out-of-state bank holding companies is not a matter of regional insularity or the protection of local vested economic interests. A transcending concern of regulation of financial institutions has been to avoid concentration of economic influence and its anti-competitive effects by any limited group.

The risk of undue concentration is perhaps best exemplified by what has occurred as a result of the district court declaring § 659.141 unconstitutional. A number of institutions from the money centers have made application to open trust companies in Florida. The list includes Continental Illinois Corporation, Bankers Trust New York Corporation, Manufacturers Hanover Corporation, U.S. Trust Corporation, Detroitbank Corporation, Morgan Holdings Corporation, a subsidiary of J. P. Morgan & Company, and Harris Bankcorp, Inc. As of 1977 these institutions had trust assets under management of approximately $100 billion. FDIC, OCC and Bd. of Gov. Fed. Res., *1977 Trust Assets of Insured Commercial Banks,* Table 7 (1978). In comparison, the total trust assets under management in Florida is approximately $9 billion. Nearly every applicant has trust assets under administration exceeding the total for all of Florida. The strong interest of the states in the healthy development of financial institutions is unquestionably challenged by such

a vast influx of economic power. It is for this reason that Congress has time and time again given recognition to the importance of geographical restraints on expansion to prevent concentration of power nationally and in the states.

By restricting ownership ties of the regulated enterprises, the Florida statute responds to the impact on Florida's citizens posed by control of financial institutions by entities headquartered beyond the reach of Florida's enforcement and regulatory powers. The undesirability of control of local financial institutions by far-flung conglomerate entities is a proper and legitimate subject of state concern, historically recognized by Congress and the judiciary. See, e.g., *Iowa Independent Bankers* v. *Board of Governors,* 511 F. 2d 1288 (D.C. Cir. 1975), *cert. denied* 423 U.S. 875 (1975); *American Trust Company, Inc.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313 (D. S.C. 1974). The basis for this concern is substantial. Financial holding companies are fertile ground for facilitating monopolization through anti-competitive activities. The opportunities for tying arrangements, reciprocal dealings, biased inter-company transactions and self-dealing are manifest. See *Bank Holding Company Act Amendments: Hearings on H.R. 6778 Before the House Comm. on Banking and Currency,* pts. 1-2, 91st Cong., 1st Sess. (1969); *Control of Bank Holding Companies: Hearings on S. 880, S. 2350, and H.R. 6227 Before the Subcomm. on Banking of the Senate Comm. on Banking and Currency,* 84th Cong., 1st Sess. 64-66 (1955); Nosker, *A Supervisor Looks At Recent Banking Developments, Problems, And Prospects,* 94 Banking L.J. 18 (1977). These risks to the public welfare aggravated when geographic dispersal beyond jurisdictional powers renders effective regulation virtually impossible. The same risks are far more amenable to regulation, and abuses far more likely to be discovered, when the bank, trust company or investment advisory business is an independent entity or owned by institutions whose operations are principally conducted within the jurisdiction of a single state regulatory authority.

The district court did not fully grasp the importance of these considerations, as it misconceived the congressional intent behind the 1970 Amendments to the Bank Holding Company Act. As the District of Columbia Circuit Court of Appeals has noted in *Investment Company Institute* v. *Board of Governors,* —— F.2d ——, Case No. 77-1862. (D.C. Cir. March 30, 1979), a deep congressional concern in the enactment of the 1970 Amendments to the Bank Holding Company Act was to prevent the structuring of the American economy in a manner similar to the *Zaibatsu* system of Japan, where multiple types of economic activity are concentrated in a few conglomerates wielding vast power. See *Bank Holding Company Act Amendments—Hearings on H.R. 6778 Before the House Comm. on Banking and Currency,* 91st Cong., 1st Sess. at 13 (1969); *One Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. at 9, 21 (1970).

Congress by no means intended to encourage the creation of financial conglomerates. Instead, Congress curtailed the ability of one-bank holding companies to control non-bank subsidiaries by bringing them within the Act, and made a minor alteration in the extent

to which bank holding companies could enter into traditional areas of banking activity new to the particular institution, but not to the industry. The lack of any indication of a congressional intent to establish a policy in favor of branching across state lines by financial institutions is significant. The long history of Congress' policy of allowing the several states to control the extent to which interstate branching could occur is hardly likely to have been altered without considerable debate. Indeed, as recently as 1978, Congress reaffirmed the principles of the McFadden Act and the Douglas Amendment when it incorporated the substance of those laws into the International Banking Act of 1978. See 12 U.S.C. §§ 3102(a), 3102(h), 3103, 3107.

On the other hand, there was no need for Congress to specifically address in 1970 the extent of the power of the states to prohibit holding company control of subsidiaries across state lines. It had done so previously in 1956 by bowing to state regulation of control of banks across state lines, and by reserving to the states full power and jurisdiction "with respect to banks, bank holding companies, *and subsidiaries thereof.*" (Emphasis Supplied.) See Jessee & Selig, *Bank Holding Companies And The Public Interest,* at 140 (1977); *Iowa Independent Bankers* v. *Board of Governors,* 511 F. 2d 1288, 1297 (D.C. Cir.), *cert. denied* 423 U.S. 875 (1975); *Commercial National Bank* v. *Board of Governors,* 451 F. 2d 86, 89 (8th Cir. 1971); *American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313, 320 (D. S.C. 1974).

The regulation of control over corporations has traditionally been a matter of state concern. See *Louis K. Liggett Co.* v. *Lee,* 288 U.S. 517, 556-561 (1933) (Brandeis, J. dissenting). In the absence of contrary federal law, state regulation of corporate ownership has been upheld under the commerce clause. See *Louisville & Nashville R.R.* v. *Kentucky,* 161 U.S. 677 (1896). Moreover, banks, trust companies and investment advisory businesses are affected by the public interest to such an extent that they constitute an area of traditional state concern. See *Noble State Bank* v. *Haskell,* 219 U.S. 104, 113 (1911); 1 A. Scott, The Law of Trusts § 1.11, (3d ed. 1967); 4 L. Loss, Securities Regulation 2219 (1969); *Marketlines, Inc. . Chamberlain,* 63 Ill. App. 2d 274, 211 N.E. 2d 399, 402 (1965). Considering the express language of Congress in the context of the history of the dual system of banking and traditional concepts of the regulatory powers of the states, it is clear that the congressional intent in making an express reservation of state power in the Holding Company Act of 1956 was to avoid any question that Congress intended to pre-empt an area of traditional state concern, and to authorize full regulatory controls by the states.

Given the negligible affect of § 659.141 on interstate commerce, the substantial interest of Florida in the area regulated and the express authorization of state regulation by Congress, the district court should not have held the statute *per se* invalid under the commerce clause, but should have upheld it under the teachings of *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); and *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946).

II.

The Negative Implications Of The Commerce Clause Do Not Invalidate State Laws Requiring State Chartering Of Trust Companies Doing Business Within A State.

In declaring § 660.10, Florida Statutes unconstitutional, the district court mistook the nature of the statute. Section 660.10 does not prohibit anyone from doing a trust business in Florida. It only requires that the trust business be done through a trust company chartered in the regulatory process established by law. It constitutes simply a regulatory technique for assuring that the trust business is conducted in a proper manner. It has no significant effect on interstate commerce.

Trust companies organized under the laws of other states may enter into transactions in Florida consistent with duties resulting from such a trust company becoming the executor or administrator of an estate; or trustee under a will, charitable foundation or endowment; or similar trust. The powers of such foreign trust companies to engage in limited transactions in Florida are detailed throughout the various provisos to the statute. Foreign trust companies may contract within Florida in regard to loans, security instruments, and acquisition or conveyance or management of property in relation to loans or obligations. They may service Florida customers directly, or indirectly by contract with other persons, and are allowed full access to the courts of the state to enforce obligations. The statutory prohibition is aimed solely at intrastate activity. Foreign trust companies can not be the executor or administrator of a decedent's estate, except as set forth in the Uniform Probate Code, Chapter 734, Florida Statutes, for ancillary administration. Otherwise the restrictions on foreign trust company activity is limited

to serving within Florida as a testamentary trustee, a court appointed receiver or guardian, and holding real property in trust. However, it is expressly permissible for a foreign trust company to be bequeathed property, including real property, by a testator, with the laws of the trust company's principal place of business governing its duties as trustee. § 660.10(3), Florida Statutes.

The statute applies equally to all persons, creates no competitive advantages and erects no barriers to commerce. The statute is concerned solely with the sensitive area of protection of decedents estates, fiduciary relationships and the devise of real property. These are matters peculiarly of state concern and have been so recognized by this Court. *United States* v. *Fox*, 94 U.S. 315 (1877). Indeed, like statutes exist in at least fourteen other states and have been common place in the law of trusts. See *Appendix, Brief In Support Of The Jurisdictional Statement For The Conference Of State Bank Supervisors As Amicus Curiae*, at 21; 1 A. Scott, The Law of Trusts § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator, or Testamentary Trustee*, 26 A.L.R. 3d 1019 (1969).

Florida's statute serves only one purpose, and that is to require that the trust business be conducted by all under a specially tailored regulatory process, with the only exception being that national banks duly authorized to exercise trust powers by federal regulators are permitted pursuant to the doctrine of competitive equality. See *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313 (D.S.C. 1974). It is in effect a licensing requirement for doing business intrastate. As such, the statute is an exercise of the sovereign power of a state to exclude a foreign

corporation from its boundaries solely because it is a foreign corporation. See *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562 (1949); *Asbury Hospital* v. *Cass County,* 326 U.S. 207 (1945); *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869) *as modified, United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). The only limitations upon this power is the erection of actual barriers to the flow of commerce interstate and the ouster of federal instrumentalities. *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania,* 125 U.S. 181 (1888). When the effect of a statute barring foreign corporations is limited to operation of offices within the host state, and does not bar commercial intercourse, the power of a state to exclude is wholly discretionary. *Id.* See also, *Atlantic Refining Co.* v. *Virginia,* 302 U.S. 22 (1937); *Hemphill* v. *Orloff,* 277 U.S. 537 (1928); *Diamond Glue Co.* v. *United States Glue Co.,* 187 U.S. 611 (1903); *Bank of Augusta* v. *Earle,* 38 U.S. (13 Pet.) 519 (1839).

The only basis for § 660.10 being questioned in this proceeding is the extent to which § 659.141 interacts with it to bar bank holding companies whose operations are conducted principally outside of Florida from forming a Florida trust company. As discussed in Point I of this brief, such a bar does not violate the Commerce Clause. The primary error of the district court's reasoning was to miscomprehend the nature of the principles set forth in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Rather than examining the marketplace and the flow of commerce across state lines, it looked solely to the effects of § 660.10 upon certain marketers. The district court viewed any effect upon interstate commerce sufficient to allow federal regulation to be sufficient to condemn state laws drawing any

lines between domestic and foreign corporations. It considered legitimate state interests "irrelevant" because such distinctions were drawn. 461 F. Supp. at 1197.

There is nothing in the record suggesting that § 660.10 has been applied by state regulatory authorities in a manner discriminating against interstate commerce, not even an allegation. The sole basis for the statute being condemned is that it requires foreign trust companies to form a Florida trust company to do business in Florida. The district court's reasoning grants a constitutional right to corporations to establish offices without regard to state boundaries, placing in question even the power of the states to require foreign corporations to qualify with state authorities before doing business within a state. The district court has forced Florida to recognize a special privilege of engaging in business in the corporate form granted by another state, despite innumerable rulings of this Court that the states are not constitutionally obligated to do so. *E.g., Wheeling Steel Corp.* v. *Glander, supra; Asbury Hospital* v. *Cass County, s pra; Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania, supra.* Also not considered is the need to interpret the Commerce Clause in a manner consistent with the Privileges and Immunities Clause. As this Court has noted, these two provisions of the Constitution have a common source. *Baldwin* v. *Montana Fish And Game Comm'n,* 436 U.S. 371, 379-381 (1978). While these two provisions have different subject matters, the goal is the same. There can hardly be a sovereign state right under the Privileges and Immunities Clause to disregard the special privilege granted by another state to do business in the corporate form, and a lack of state power under the Commerce Clause to make the distinc-

tion. The power either exists or it does not. This Court has consistently viewed the states as having the sovereign power to distinguish between domestic and foreign corporations, interpreting the Commerce Clause to limit that power only to the extent that commercial intercourse across state lines is unduly burdened. *Diamond Glue Co.* v. *United States Glue Co., supra; Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania, supra;* cf., *Lincoln National Life Ins. Co.* v. *Read,* 325 U.S. 673 (1945). The district court should have done the same.

Since § 660.10 does not discriminate against interstate commerce, does not favor Florida citizens over others, does not create a protected market and otherwise has no effect on interstate commerce, but is merely the exercise of the sovereign power to exclude foreign corporations from doing an intrastate business without proceeding through the regulatory process applied to all persons, it is a valid law.

CONCLUSION

For the reasons stated above, the decision of the District Court for the Northern District of Florida should be reversed.

Respectfully submitted,

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FOR ARGUMENT

No. 79-45

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IN THE

Supreme Court of the United States

October Term, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

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GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*

This brief is filed under Rule 42(1) of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association, founded in 1853, is an association of twelve leading banks in the City of New York, each of which is owned by a bank holding

company.[1] The Association clears checks and other items in the New York area and, through its counsel, files briefs before courts of appellate jurisdiction in cases that raise questions of law materially affecting banks or their affiliates.

The bank holding company organizations of which the Association's members are a part have a strong and direct interest in being able to compete in the offering of investment advisory, trust and other services throughout the Union, free of discriminatory state regulation unauthorized by Congress.

Statement

Appellee Bankers Trust New York Corporation ("Bankers"), a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.*, seeks to offer investment advisory and trust services in Florida through local offices of a nonbank subsidiary (B2-7).[2] Bankers has been prevented from doing so by reason of the statutes held invalid below, Florida Statutes § 659.141(1) (first sentence)[3] and § 660.10 (B4-7). Those statutes, reprinted

[1] The members of the Association are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Bank of North America and European American Bank & Trust Company.

[2] Appellee BT Investment Managers, Inc. is a Delaware subsidiary of Bankers formed for the purpose of conducting an investment advisory business in Florida (B2). "B", "C" and "D" citations are to the appendices to the Jurisdictional Statement ("JS") so entitled. "App." citations are to the separately bound Appendix (tan cover).

[3] The judgment below did not extend to that portion of the first sentence of § 659.141(1) that prohibits out-of-state bank holding companies from acquiring *banks* located in Florida (D1-2). Congress has itself prohibited such acquisitions, absent affirmative legislative consent by a particular State. 12 U.S.C. § 1842(d).

at C1-4, in conjunction prohibit any bank holding company whose operations "are principally conducted outside" Florida from competing in the investment advisory and trust businesses in Florida.[4]

The district court held the statutes invalid under the Commerce Clause, as being in both purpose and effect purely "discriminatory protectionist legislation designed to promote local business to the exclusion of interstate competition and commerce" (B11). The court's conclusion as to purpose and effect is inescapable from the statutes themselves (see B12) and from the circumstances of the hurried amendment of § 659.141(1) (see B4-5, B15-16) and has been concurred in by both the Federal Reserve Board, 59 Fed. Res. Bull. 364, 366, and the Fifth Circuit, 559 F.2d 950, 954 & n.13, in earlier proceedings. The district court also rejected Florida's contention that Congress has consented to such otherwise unconstitutional discrimination (B17-21).

Florida and *amici curiae* Conference of State Bank Supervisors ("State Supervisors") and Florida Bankers

[4] Although the district court declared both statutes unconstitutional, it enjoined the enforcement only of the relevant portion of § 659.141(1), finding that an injunction would be premature as to § 660.10 (B22). As appellant ("Florida") acknowledges (Brief at 46), however, it was the *combination* of § 659.141(1)—which prohibited Bankers from owning a Florida trust company—and § 660.10—which prohibited all corporations other than Florida banks and trust companies from rendering trust services within Florida—that wholly precluded Bankers from providing trust services in Florida, and it was that statutory preclusion which was invalidated and is in issue here. Indeed, it is a stipulated fact that Bankers would comply with § 660.10 by forming a Florida trust company subsidiary were it not forbidden from doing so by the invalidated portion of § 659.141 (App. 23-24).

Thus, whether § 660.10 in isolation would be constitutional was not raised or decided below, and the second of Florida's Questions Presented (Brief at 4, discussed Brief at 45-53) goes beyond the confines of the controversy between the parties.

Association ("Florida Bankers") argue here both that Florida's discriminatory legislation is proper "regulation" under the Commerce Clause and that, in any event, Congress has consented to it. Their constitutional argument rests on a distorted reading of this Court's controlling decisions, and their attempt to create congressional consent depends on a tortured analysis that wholly ignores the structure and language of the Act and its legislative history. Both arguments are plainly wrong, as is the belated and remarkable suggestion, not joined in by Florida, that interstate commerce is not affected by Florida's statutory scheme. (See note 6, page 7, *infra*)[5]

Summary of Argument

This case presents only two issues: Whether Florida has transgressed the Commerce Clause by prohibiting out-of-state firms from competing with similarly situated local firms in the provision of trust and investment advisory services, which it patently has; and whether Congress has validated that transgression by its manifest consent, which it plainly has not.

The district court's judgment that Florida must legislate in conformity with the Constitution simply has nothing

[5] State Supervisors argue that the "rationale" of the decision below could jeopardize a "significant number" of state statutes cited in an appendix to their brief (Brief at 38; see Brief at 1 & n.1). The fact is that *none* of the other state statutes listed by State Supervisors is comparable to Florida's legislative scheme (see note 4, page 3, *supra*) because none precludes out-of-state holding companies from offering investment advisory services through local offices and subsidiaries or from establishing local trust company subsidiaries. The majority of the statutes cited simply prevent out-of-state holding companies from acquiring in-state *banks* and as such are clearly valid in light of 12 U.S.C. § 1842(d) (see note 3, page 2, *supra*). The others merely prohibit out-of-state corporations from serving in certain fiduciary capacities, without preventing their formation of local subsidiaries to act in such capacities.

to do with the continued existence of the dual system of banking (*i.e.*, the coexistence of federally chartered and state chartered banks) or the dual system of bank regulation (*i.e.*, the scrutiny, supervision and regulation of banks by both federal and state authorities). Indeed, the judgment, like the case, has nothing to do with banking at all. Nor does the decision below challenge in any way the ability of a State to require an out-of-state corporation to be locally licensed or to incorporate a local subsidiary as a condition of doing business, so long as such requirements are not used as devices to hinder commerce.

Florida's blatant protection of local business interests from out-of-state competition represents the paradigm of what the Commerce Clause forbids. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Hughes* v. *Oklahoma*, 441 U.S. —, 99 S. Ct. 1727 (1979). Florida's tortured, *ex post facto* efforts to create legitimate local interests and its rhetoric—echoed by *amici*—about giant financial combines are but expressions of disagreement with the decision of the Framers almost two centuries ago to create an economic as well as a political Union of the several States. Such disagreements raise no question for this Court. *Baldwin* v. *G.A.F. Seelig, Inc.*, *supra*.

Likewise, the alleged manifestations of Congress' consent are illusions lacking any substance.

Congress has unmistakably empowered the States, merely by legislative inaction, to preclude the entry of commercial bank subsidiaries of out-of-state bank holding companies. This case does not, however, in any way involve the business of commercial banking, as understood for decades and as defined unambiguously by Congress in the Bank Holding Company Act. *See United States* v. *Philadelphia National*

Bank, 374 U.S. 321 (1963). Rather, it involves other businesses—investment advisory and fiduciary services—that may be conducted by firms having banking powers as well as by firms and natural persons having no banking powers at all. These businesses are not transformed magically into "banking" simply because they may be, and often are, carried on by banks or corporate affiliates of banks, any more than the manufacture of aircraft becomes the manufacture of automobiles if carried on by a division or affiliate of General Motors.

Congress has not declared bank holding companies to be legal pariahs for Commerce Clause purposes, and they are as fully entitled to its protection as are other firms. Since Congress has nowhere said that the States may preclude out-of-state holding companies from providing investment advisory and fiduciary services from local offices, the judgment below must be affirmed.

ARGUMENT

I.

Florida's Protectionist Statutes Are Invalid Under the Commerce Clause.

In the "few simple words of the Commerce Clause" the Framers carried out their determination that commerce among the States be subjected to the power of the Nation in order to thwart "the tendencies toward economic Balkanization" that had plagued the country before Independence and under the Articles of Confederation. *Hughes* v. *Oklahoma*, 441 U. S. —, 99 S.Ct. 1727, 1731 (1979); *see Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935) (Cardozo, J.). To carry out that mandate, this Court has for nearly a century held that the Commerce

Clause operates as a restriction on permissible state regulation even in the absence of conflicting federal legislation. *See, e.g., Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U.S. 557 (1886); *Hughes* v. *Oklahoma, supra; see also Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.) (dictum).

Accordingly, the Court has consistently stricken down state legislation that restricts or bars interstate commerce while serving no local purpose other than the elimination of out-of-state competition. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).[6]

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[6] State Supervisors open their argument by contending, for the first time, that fiduciary and investment advisory services are "personal one-on-one services" provided "on a local basis" (Brief at 10) and "do not substantially affect interstate commerce" (Brief at 9 n.4). This contention appears to be echoed by Florida Bankers (Brief at 8-10).

Congress, however, has found and declared in § 201 of the Investment Advisers Act, 15 U.S.C. § 80b-1, that investment advisory services "are of national concern" and "substantially . . . affect interstate commerce," and no evident distinction exists between those services and fiduciary services. Such legislative findings are entitled to substantial weight. *Perez* v. *United States*, 402 U.S. 146, 152-56 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), particularly where as here they square so completely with the facts. The investment business, in which capital moves from where it is available to where it is needed, is the very epitome—indeed the *sine qua non*—of interstate commerce, and investment advisory and fiduciary services are inherent elements of the investment business.

Moreover, since it is indisputable that Bankers wishes to provide its services in interstate commerce, using the offices of a local subsidiary to "deliver" to customers the analysis and judgments formed and created by its New York-based organization, State Supervisors'

(footnote continued on following page)

Florida's "brazen attempt" [7] legislatively to shield its local business interests from the prospect of interstate competition overtly blocks entry into Florida by non-Florida bank holding companies seeking to render investment advisory and trust services, and is classic protectionism, as recognized below. On its face, the invalidated statutory scheme discriminates against interstate commerce as such and has no other discernible purpose or effect. Indeed, it entirely denies all bank holding companies principally located outside Florida (and therefore lacking representation in the Florida legislature) the ability to establish investment advisory offices or do trust business in Florida, preserving that market for Florida-based firms. The fact that some non-Florida companies and all individuals are theoretically left free to compete in Florida is beside the point: the out-of-state companies most likely to enter and compete in the Florida market are totally excluded by the statutory scheme, so that functionally identical Florida companies will not have to face their competition.

(footnote continued from preceding page)

argument seems to be that a State may avoid the strictures of the Commerce Clause by prohibiting the initiation of interstate commerce as to particular commodities or services and then pointing with pride to the fact that all such trade is conducted in that State purely "on a local basis." Thus, the very existence of "economic Balkanization" as to any commodity or service becomes constitutional justification for its perpetual preservation by protectionist State legislation. This proposition mocks the Constitution and the Court.

United States v. *Oregon State Medical Society,* 343 U.S. 326 (1952), cited by State Supervisors (Brief at 9), simply holds that it was not clear error for the district court to conclude that the Government had failed to prove that interstate commerce was affected by certain activities challenged under the antitrust laws. *Compare, Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975) (legal services performed wholly intrastate substantially affect interstate commerce).

[7] *See BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954, n.13 (5th Cir. 1977) (reversing district court's decision to abstain and remanding for consideration on the merits).

This case thus involves an actual prohibition of interstate commerce, not merely a burden (incidental or otherwise) on commerce, and presents at least as appropriate an occasion as *Philadelphia* v. *New Jersey* for application of a *per se* rule of invalidity.[8] Nothing in *Hughes* v. *Oklahoma,* handed down after the decision below, or in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), suggests otherwise; indeed, application of the *Pike-Hughes* three-point test, *see* 99 S.Ct. at 1736, confirms the patent (*i.e., per se*) invalidity of Florida's protectionist scheme:

First, the challenged statutory scheme does not regulate "evenhandedly" with only "incidental" effects on interstate commerce. Indeed, it does not "regulate" at all except by directly discriminating against interstate commerce on its face and in effect. In *Hughes,* this Court emphasized that such facial discrimination may be a fatal defect (*i.e.,* require *per se* treatment), and that

> "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 99 S.Ct. at 1737.

Such scrutiny here only confirms the patently protectionist nature of the statutory scheme.

Second, the statute serves no "legitimate local purpose"; its only purpose is the protection of local business interests

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[8] Two members of the Court considered the provision held invalid in *Philadelphia* v. *New Jersey* to be a public health measure, not a regulation of "commerce" in the normal sense and certainly not designed to protect the economic interests of New Jersey's commercial community. They would have held that it did not unlawfully burden commerce—although it wholly precluded the commerce involved—in merely allowing locally generated waste, which had to be disposed of somehow, to continue to be used as landfill within the state. 437 U.S. at 629-33 (Rehnquist, J., dissenting). No such analysis is possible here; Florida's sole purpose and effect is the prohibition of interstate commerce.

—at whose behest it was enacted (see B5)—against competition from interstate firms. Having belatedly recognized the constitutional necessity of "legitimate" local purposes, Florida in its argument to the district court conjured up a local interest: it argued below that its statutory scheme, which limits the number of competitors in Florida, was intended to enhance competition there. This novel—indeed almost Orwellian—economic contention has here been abandoned by Florida,[9] which advances no other in its place, confirming further the district court's finding that Florida's only purpose was discrimination.[10] *Amici* here revive Florida's discarded rationalization and add two others, which are equally unpersuasive [11] and as to which *amici* cite not a snippet of legislative history.

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[9] Even had that been Florida's purpose, the statutes are not "even-handed," since their distinctions turn on location. *Compare, Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Moreover, their effect on interstate commerce is not "incidental" and the availability of non-discriminatory alternatives is obvious (*e.g.,* regulatory supervision of all competitors and vigorous enforcement by the State of state and federal antitrust laws). Finally, discrimination against interstate commerce having been established, the burden was on Florida to show both concrete local benefits and "the unavailability of nondiscriminatory alternatives adequate to preserve" those benefits, *Hughes, supra,* 99 S.Ct. at 1736, which it totally failed to do (see note 11, *infra*).

[10] The district court also found that Florida lacked any factual basis for its contention that the statutes were necessary and appropriate to the alleged goal of preserving competition (B14-15); far from being clearly erroneous, these two findings are irrefutable, as Florida apparently concedes.

[11] State Supervisors urge that Florida's statutory scheme is necessary to serve the following, newfound local interests, neither of which was even suggested to the district court:

> (1) *To "protect the public against unsound business practices" by excluding out-of-state bank holding companies which are "too large and too far-flung to be regulated properly"* (State

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Third, the availability of less discriminatory alternative means to serve the "legitimate" local purpose is ignored by Florida and Florida Bankers, who apparently concede the

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> Supervisors at 22; Florida Bankers at 12-13). In addition to falsely equating "out-of-state" with "large and far-flung," and "large" with necessarily less rigorously regulated, this assertion ignores the regulatory control that Florida would possess over a discrete nonbank subsidiary qualified in Florida. State Supervisors' citations to *Iowa Independent Bankers* v. *Board of Governors* and G. Fisher, *Bank Holding Companies* (1961) (Brief at 22) are of no avail: the former concerns *bank* subsidiaries, not local nonbank subsidiaries, and the latter merely discusses the problems that existed in the early twentieth century before the federal legislation which "rectified" the situation. *Id.* at 9.
>
> (2) *To "further local control" over "banks and related financial services" because of the "positive impact such local control has on the level of civic involvement and related lifestyle values"* (State Supervisors at 22). This asserted local interest, extracted almost verbatim from *Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256, 1283 (5th Cir. 1978), *reversed on other grounds sub nom. Leroy* v. *Great Western United Corp.,* — U.S. —, 99 S.Ct. 2710 (1979), is not a *legitimate* local interest under the Commerce Clause, *Baldwin* v. *G.A.F. Seelig, Inc., supra,* and is present in every protectionist scheme.
>
> This "interest" is not in any event served by Florida's statutory scheme, which excludes only out-of-state banking and trust companies; other foreign corporations are free to enter Florida, as State Supervisors themselves point out (Brief at 17-18). In addition, a Florida bank holding company escapes the ban of the statutes even if wholly owned by a Caracas, Venezuela shareholder. Furthermore, the statutory scheme would permit a major Miami bank holding company to establish a trust company or investment advisory subsidiary hundreds of miles away in the Florida panhandle, but would deny that ability to a much more "local" holding company located only a few miles away in Georgia or Alabama. Finally, to the extent Florida's statutes require bank holding companies to conduct their investment advisory business in Florida by telephone or through the mails, as suggested by Florida Bankers (Brief at 8-9), instead of through local subsidiaries, local control over such financial services is hindered, if not thwarted entirely.

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issue. State Supervisors assert that "given the nature of the interests protected," no less discriminatory alternatives exist (Brief at 28). This is obviously incorrect: Florida could, without discrimination, address all the concerns that State Supervisors now say its legislature had in mind simply by enacting a statute similar to § 4 of the Bank Holding Company Act, 12 U.S.C. § 1843. *See e.g.*, Tex. Bank Code Ann. art. 342-913 (Vernon) (Supp. 1978-1979).

Application of the "balancing test" urged by State Supervisors (Brief at 20) thus leads simply to the conclusion that the statutes are in fact *per se* invalid.

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978), upon which Florida and *amici* place heav reliance, does not lend even superficial support to their assertion that states may distinguish between functionally identical companies solely on the basis of where their operations are principally located. As the Court emphasized, the statute in *Exxon* did not "distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126. Maryland, to serve a legitimate local purpose, *id.* at 121, 125, legislated against *all* vertically integrated firms, whether Maryland-based or out-of-state. The fact that all integrated

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Amici's related argument that "regulation" of fiduciary and investment advisory activities is left to the States is both wrong and irrelevant. It is wrong because the largest and most significant segment of fiduciary business today—employee benefit trusts—is now closely governed by the federally enacted standards contained in the Employees Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. It is also wrong because, as *amici* recognize (State Supervisors at 27), state regulation of investment advisers is superseded if it conflicts with the Investment Advisers Act of 1940.

This argument is irrelevant because the decision below does not impose federal control over fiduciary and investment advisory activities, but instead simply invalidates a state's attempt not to "regulate," but to exclude.

firms were out-of-state firms was truly "incidental" to the legitimate regulatory purpose of the legislation, and non-integrated interstate firms were treated exactly as were Maryland-based non-integrated firms, with the latter afforded "no competitive advantage" over the former. *Id.* at 125-26.

Florida has not sought to exclude Florida firms otherwise similarly situated to Bankers (*i.e.*, Florida-based bank holding companies) from the trust and investment advisory businesses. Florida has acted not against economically *integrated* business but against *interstate* businesses.[13] Discrimination against interstate commerce to confer a competitive advantage on Florida's own business community is the sole purpose and effect of the statutes. *Cf. id.* at 126.[14] They are, as held below, invalid.

[13] Where the Maryland statute at issue in *Exxon* distinguished between firms based solely on their structure, Florida's statutes discriminate on the basis of the firm's location. This distinction is crucial; while a total, nondiscriminatory ban of all bank holding companies could arguably serve a legitimate local interest, as did the statute in *Exxon*, the exclusion solely of out-of-state firms can only serve the illicit purpose of discrimination.

[14] Florida and *amici* repeatedly assert that an otherwise unconstitutional statutory prohibition on interstate commerce can be rescued from invalidity if there are some exceptions to the prohibition, no matter how small or insignificant. Thus, they cite the potential for entry by out-of-state individuals and some out-of-state corporations, but ignore the sole purpose and function of the statutes—to confer a competitive advantage on Florida's own business community by treating functionally identical in-state and out-of-state firms completely differently.

The Commerce Clause is not satisfied so long as some out-of-state entry is possible, particularly when those for which such "entry" is theoretically possible are the least likely to enter; it requires more—an absence of discrimination against interstate commerce, as such, to advantage local economic interests. To read the Commerce Clause as invalidating only those statutes which contain no exception whatsoever, as Florida and *amici* would do, is to read the Commerce Clause out of the Constitution.

We note, finally, that neither the district court nor Bankers disagreed with the propositions that states may exercise their police power to regulate fiduciaries, banks and investment advisers (State Supervisors at 20-21, 24) or that states may require out-of-state corporations to obtain a certificate of authority before doing business within a state (Florida Bankers at 9-10, 14-15). But in the absence of congressional sanction (which does not here exist, see Point II, *infra*), these traditional powers to *regulate* do not embrace the power to *exclude* discriminatorily, and none of the cases cited by State Supervisors or Florida Bankers holds, or even suggests otherwise.[15]

II.

Congress Has Not Authorized the States To Discriminate Against the Nonbank Subsidiaries of Out-of-State Bank Holding Companies.

Florida and State Supervisors would have the Court find congressional consent to Florida's patent discrimination against interstate commerce in § 3(d) and § 7 of the Act, 12 U.S.C. §§ 1842(d), 1846. Section 3(d), which pertains to the formation or acquisition of *banks* by bank holding companies, simply has nothing to do with this case because this case has nothing to do with the formation or acquisition of a bank. Section 7, which merely allows the exercise of otherwise legitimate state authority—to the extent not inconsistent with the Act—likewise has no bearing here since the States have no authority under the Constitution

[15] Florida and State Supervisors misconstrue the import of § 222 of the Investment Advisers Act, 15 U.S.C. § 80b-18a (Florida at 59; State Supervisors at 26-27). At issue here is not the ability of a state securities commissioner to regulate investment advisers, but the power of the state legislature to prevent all out-of-state bank holding companies from establishing investment advisory businesses in Florida. It is not conflict with the Advisers Act that is before the Court (State Supervisors at 27), but conflict with the Constitution.

to discriminate against interstate commerce for the benefit of local business interests.

STRUCTURE OF THE BANK HOLDING COMPANY ACT. In the Act, Congress has classified the subsidiaries of bank holding companies into two categories: (1) "banks" and (2) all others, *i.e.*, those doing such nonbanking businesses as may be authorized by the Federal Reserve Board, pursuant to the limitations and standards of the Act. Section 3 of the Act regulates the formation and acquisition of "bank" subsidiaries, and includes in § 3(d) a restriction of "bank" acquisitions across state lines. Section 4 limits and regulates the other, nonbanking, subsidiaries that may be organized or acquired by holding companies, and contains no interstate restrictions. The nonbanking activities sanctioned by § 4 include investment advisory and trust services, as the Federal Reserve Board has by regulation declared. 12 C.F.R. § 225.4(a)(4), (5). Florida and State Supervisors here call upon the Court to rewrite the Act and to eliminate the sharp distinction Congress has drawn.

SECTION 3(D). This subsection of § 3 prohibits holding companies from crossing State lines in their ownership of "bank" subsidiaries, unless the State of the bank to be acquired or organized has by statute waived the prohibition. Florida and State Supervisors urge that this narrow state role—to *waive* the restriction of § 3(d)—also includes the power to *extend* it to § 4 activities, so that out-of-state bank holding companies may constitutionally be barred from acquiring or organizing nonbank subsidiaries within the State. This contention is nonsense:

First, the prohibition of § 3(d) applies by its plain language only to holding companies' acquisitions of "banks," a term Congress carefully defines in § 2(c) of the Act as

> "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on de-

> mand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

Neither Florida nor *amici* contend that Bankers seeks to own and operate in Florida a business that would be a "bank" within the meaning of § 2(c); they argue instead that the term is or should be construed more broadly than Congress, in specific terms, has defined it. This, Florida says, is necessary to close a "loophole." (Brief at 26)[16]

The attempt to substitute in § 3(d) a different, and unusual, meaning for the word "bank" than that which is prescribed by the preceding section of the Act contravenes established principles of statutory construction, not to mention common sense. Florida and *amici's* extensive argument of purported congressional policy and legislative history disregards the importance this Court has consistently accorded a statute's plain meaning. Where the provisions of a statute are "clear and unequivocal on their face," the Court finds "no need to resort to the legislative history of the Act." *United States* v. *Oregon,* 366 U.S. 643, 648 (1961) (footnote omitted).[17]

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[16] State Supervisors also attempt to manipulate legislative history to justify an interpretation of § 3(d) that contrasts sharply with its plain meaning (Brief at 29-31). In fact, the legislative history reinforces the plain meaning by demonstrating that § 3(d) was enacted to eliminate a concern that the general McFadden Act restriction on *bank* branching across state lines would be subverted by holding company incorporation of separate *bank* subsidiaries in various states. 102 CONG. REC. 6860 (remarks of Sen. Douglas) (1956); *see* H.R. REP. No. 609, 84th Cong., 1st Sess. 24 (1955) (discussing § 5(c) of H.R. 6227).

[17] *Cf. United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (1940):

> "When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." (footnote omitted)

Here, no such "absurd or futile" or even arguably unreasonable results stem from the statute's plain meaning.

In a futile effort to avoid the plain meaning of the defined term "bank", State Supervisors fashion a unique approach to statutory construction: superseded definitions of "bank" in the Act should be consulted when construing § 3(d) and the present definition should be ignored (Brief at 29-30). Their illogical argument disregards determinative legislative history. "Bank" was originally defined in the Bank Holding Company Act of 1956 to include "trust companies" because in several states some commercial banks were called "trust companies." Staff of Senate Comm. on Banking and Currency, 89th Cong., 1st Sess., Amendments to the Bank Holding Company Act of 1956 6-7 (Comm. Print 1965). As Congress recognized, this definition was inadvertently overbroad in embracing nondeposit trust companies and, accordingly, one of the 1966 amendments to the Act modified the definition of "bank" to exclude such companies.[18] Thus, even if the restriction of § 3(d) unintentionally applied to all trust companies in 1956, Congress deliberately acted in 1966 to cure the error.[19]

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[18] "The purpose of the act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. . . . To avoid this result, the bill redefines 'bank' . . . as to exclude institutions like . . . nondeposit trust companies." S. REP. No. 1179, 89th Cong., 2d Sess. 7 (1966).

[19] Florida Bankers is fully aware of this deliberate decision and is now trying to persuade Congress to reverse it. Upon the urging, *inter alia,* of Florida Bankers, 125 CONG. REC. S15525 (daily ed. Oct. 31, 1979), the Senate included an amendment to § 3(d) in the proposed Depository Institutions Deregulation Act of 1979, H.R. 4986, which was passed by the Senate on November 1, 1979. 125 CONG. REC. S15691 (daily ed.). The Senate revision of H.R. 4986 would apply the restrictions of § 3(d) "to the acquisition of shares or assets of, or interests in, a trust company." H.R. 4986, 96th Cong., 1st Sess. § 312 (1979). Obviously, if § 3(d) already applied to trust companies, such an amendment would be superfluous.

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Confronted with a statute whose plain meaning clashes with their contention and whose legislative history squarely confirms the plain meaning, Florida and *amici* can only argue, once again incorrectly, by analogy from the McFadden Act, 12 U.S.C. § 36. State Supervisors, in particular, argue that § 3(d) must be construed broadly to insure "competitive equality between state and national banks" (Brief at 30), which they say is a congressional policy expressed in that Act. This illogical proposition, even if valid, has no application here: Bankers is a *state,* not a national bank. In addition, Florida's statutory scheme excludes both national and state banks and cannot be justified by a purported policy of congressional competitive equality between state and national banks.[20]

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Enactment of the Senate version of H.R. 4986 would moot this action insofar as it concerns trust services.

[20] State Supervisors thus mischaracterize *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966), in suggesting that the Court there found a congressional policy of generalized "competitive equality between state and national banks" in all markets (Brief at 30). They omit reference to critical language in the Court's opinion:

> "It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added).

As discussed, the present case has literally nothing to do with "competitive equality between state and national banks" in any respect.

State Supervisors' reliance on *St. Louis County National Bank* v. *Mercantile Trust Company National Ass'n.,* 548 F.2d 716 (8th Cir. 1976), is also misplaced. There, the court construed the McFadden Act's definition of "branch":

> "The term branch as used in this section shall be held to *include* any branch bank, branch office, branch agency, addi-

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Florida's "loophole" argument is but its way of saying that it disagrees with the policy decision made by Congress to treat differently the banking and nonbanking activities of bank holding companies. The "loophole" is the law.[21]

Second, the attempt to expand the prohibition of § 3(d) to encompass nonbank subsidiaries disregards the language of § 3(d): "no application shall be approved under *this section*"—*i.e.,* § 3, which as noted above governs only the formation or acquisition of *banks.* Section 4 regulates holding companies' entry into nonbanking ventures such as in-

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> tional office, or any branch place of business located in any State . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (emphasis added).

The Eighth Circuit, stressing the word "include," 548 F.2d at 718-19, simply rejected an assertion that any office of a bank at which no "deposits are received, or checks paid, or money lent" is necessarily not a branch. By contrast to the arguably open-ended definition construed in *St. Louis County National,* the definition of "bank" in the Bank Holding Company Act is precise and limiting, *see* 12 U.S.C. § 1841(c), *supra,* and the "broad approach" to statutory construction urged by State Supervisors (Brief at 31), while perhaps appropriate in *St. Louis County National,* has no place here.

[21] Florida's and *amici's* reliance on *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* [Current] FED. SEC. L. REP. (CCH) ¶ 96,813 (D.C. Cir., March 30, 1979), *modified,* No. 77-1862 (D.C. Cir., July 13, 1979) (whether bank holding companies and their subsidiaries can have certain relationships with investment companies) is unavailing and, in fact, misleading. That case, like others cited by Florida (Brief at 33), simply decided whether certain *types* of nonbanking activities were so closely related to banking as to be permissible for bank holding companies under § 4, not whether a State may preclude out-of-state holding companies from engaging in activities that in-state holding companies may conduct under both § 4 and applicable state law. The activities involved in *ICI,* moreover, are not the activities here, as that case dealt with the relationship of bank affiliates to regulated investment companies.

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vestment advice and trust administration, and that section contains no restriction comparable to § 3(d).[22]

Third, were § 3(d) not limited to holding companies' acquisitions of "banks" (as defined), its flat prohibition would already operate to prohibit Bankers' proposed Florida operations. If, as Florida and State Supervisors suggest, Congress intended § 3(d) to have that effect, there would be no need for Florida's own legislative prohibitions. The authors of the hasty amendment to § 659.141(1), Florida's legislators and bankers, unmistakably understood what Florida's advocates do not.[23]

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The "straw man" issue stressed by Florida—whether the 1970 amendments to the Act liberalized the *types* of activities in which bank holding companies can engage—is wholly irrelevant to this case. The only issue here is the constitutionality of state-imposed geographical barriers to admittedly permissible activities—activities permitted by Florida to its own companies.

In any event, the court of appeals in *ICI,* in a modification of its opinion, expressly rejected the broad reading of that opinion pressed by Florida's advocates:

> "Under these circumstances, we do not reach, and are not to be taken as expressing any view on, the question of whether bank holding companies and their non-bank subsidiaries may, either under the present regulation or one more narrowly drawn, *render solely investment advice* to closed-end investment companies, as distinct from sponsoring, organizing, managing, or controlling such companies." *Id.,* n.13, *added by order,* No. 77-1862 (D.C. Cir., July 13, 1979) (emphasis added).

[22] The question of whether § 3 or § 4 governs an application is not, even apart from § 3(d), merely an administrative technicality, since the two sections specify different criteria by which applications are to be judged.

[23] Florida and *amici* actually argue that § 3(d) prohibits *all* holding company acquisitions of nonbanking businesses except in the one state in which the holding company's banking business is principally conducted. This construction of § 3(d) would invalidate literally hundreds of acquisitions approved by the Federal Reserve Board since 1956, the incredible result of an incredible suggestion.

SECTION 7. In their faltering effort to demonstrate that Congress intended to sanction Florida's discrimination against interstate commerce, Florida and *amici* grasp as well at § 7 of the Act, 12 U.S.C. § 1846. Florida argues in the face of clearly contrary statutory language and legislative history that § 7 "operates to assure that the states are free to regulate bank holding companies and their subsidiaries without fear of Commerce Clause attack" (Brief at 64).

Again, Florida and *amici* are plainly wrong. As the legislative history makes abundantly clear, § 7 was not intended to grant new authority to the States, but only "to *preserve* to the States those powers which they now have in our dual banking system." S. REP. No. 1095 (Part 2), 84th Cong., 2d Sess. 5 (1956) (emphasis added).[24] The plain language of the section unambiguously carries out that purpose:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Thus, the only state legislation permitted by § 7 is that which would have been permitted absent enactment of the Act, *i.e.,* that which passes muster under the Commerce Clause *without* aid of congressional authorization, which

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[24] The Senate Report further states with respect to § 7:

> "The intent of the committee was to make it clear that a State could not enact legislation inconsistent with the bill and therefore nullify its effect. . . . [Y]our committee reiterates its view that section 7 in no way permits States to exercise such powers and jurisdiction in a manner inconsistent with this proposed legislation." *Id.*

the Florida statutory scheme does not. A section of the Act that merely preserves the otherwise lawful "powers and jurisdiction" of the States over "banks, bank holding companies, and subsidiaries" cannot by mere assertion be transformed into a section that adds substantial new powers of otherwise unconstitutional breadth.

Amici State Supervisors and Florida Bankers argue that before passage of the Act, the States possessed the power to enact the statutes at issue here. For example, State Supervisors say that since the States are free to ban bank holding companies altogether, the "lesser restrictions" of Florida's statutory scheme must be permissible (Brief at 34). This argument simply ignores the nondiscriminatory nature of a total prohibition and begs the central question: whether the "lesser restrictions" which blatantly favor Florida over non-Florida holding companies are constitutional.

* * *

"This case presents the narrow question of what Congress did, not what it could do." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941). What Congress did here is quite clear; it limited to "banks" the States' power to exclude subsidiaries of out-of-state bank holding companies. It did not authorize unconstitutional discrimination against interstate commerce in trust and investment advisory services such as Florida seeks to enforce.

Conclusion

The decision below fully accords with this Court's controlling decisions under the Commerce Clause. The construction of the Bank Holding Company Act proposed by Florida and *amici* is patently wrong. The judgment below should be affirmed.

Respectfully submitted,

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No. 79-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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April 22, 1980

IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 41(b) of the Rules of this Court, the undersigned counsel for Appellees, BT Investment Managers, Inc. and Bankers Trust New York Corporation, moves for special leave to file the attached supplemental brief to bring to the attention of the Court § 712 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, which became law on March 31, 1980.

As is more fully explained in the attached brief, § 712 must be accorded effect in formulating the Court's judgment on one aspect of this case and bears implicitly on another.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE APPELLEES

I.

This case concerns the validity of Florida's legislative effort to exclude from the State both investment advisory and trust company subsidiaries of out-of-state bank holding companies, and out-of-state corporate fiduciaries.

The Court's decision depends in part on construction of the Bank Holding Company Act of 1956 (the "Act"), including § 3(d) thereof, 12 U.S.C. § 1842(d). Section 3(d) has been amended by § 712 of the Depository Institu-

tions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, which became law on March 31, 1980.

Section 712 provides as follows, in its entirety:

> "SEC. 712. (a) Section 5169 of the Revised Statutes (12 U.S.C. 27) is amended by adding at the end thereof the following: 'Notwithstanding the provisions of the preceding sentence, a national banking association the operations of which are limited as provided in the preceding sentence shall be deemed an additional bank within the contemplation of Section 3 of the Bank Holding Company Act of 1956.'
>
> "(b) Section 3(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)) is amended by inserting '(1)' after '(d)' and by adding at the end thereof the following:
>
> '(2)(A) Except as provided in subparagraph (B), the restrictions contained in paragraph (1) regarding the acquisition of shares or assets of, or interests in, an additional bank shall apply to the acquisition of shares or assets of, or interests in, a trust company.
>
> '(B) Subparagraph (A) shall not apply with respect to the acquisition of shares or assets of, or interests in, a trust company if such acquisition was approved by the Board on or before March 5, 1980, and if such trust company opened for business and was operating on or before March 5, 1980.
>
> '(C) For the purpose of this paragraph, the term 'trust company' means any company whose powers are limited to the powers specified in subsection (a) of the first section of the Act entitled "An Act to place authority over the trust powers of national banks in the Comptroller

> of the Currency", approved September 28, 1962 (12 U.S.C. 92a), for a national bank located in the same State in which such trust company is located.'.
>
> "(c) The amendments made by this section are hereby repealed on October 1, 1981."

II.

A. By enacting § 712 Congress has temporarily extended the prohibitions of § 3(d) to encompass new *trust company* subsidiaries of out-of-state bank holding companies, including appellee Bankers Trust New York Corporation, during the period from March 31, 1980 through September 30, 1981, but only during such period.

The brief of the New York Clearing House Association, *Amicus Curiae,* of December 19, 1979, referred at pages 17 and 18, footnote 19, to an earlier version of what became § 712 and observed that enactment of that version "would moot this action insofar as it concerns trust services." Unlike the earlier version, however, § 712 as enacted is repealed on October 1, 1981 by its own terms. Consequently, there still exists a controversy between the parties as to whether on and after October 1, 1981 Bankers Trust is entitled to do a trust business in Florida through a locally or federally incorporated subsidiary. That aspect of this seven year-old case is not moot, and Article III does not require the Court to defer a decision on the merits until Bankers Trust files another case and endures another period of protracted litigation.[1]

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[1] Congress does not intend that its imposition of a moratorium nullify pending applications to acquire trust company subsidiaries, thus requiring the filing of new applications after October 1, 1981. Only *approval* of applications is proscribed during the period; pending applications are to remain pending until the moratorium expires:

(footnote continued on following page)

B. The enactment of § 712 demonstrates Congress' understanding that without its terms the Act, as argued previously, neither precludes, nor consents to State legislation precluding, the conduct of an interstate trust business by bank holding companies through locally incorporated and regulated subsidiaries. Otherwise, § 712 would be superfluous and, indeed, would create an internally inconsistent statutory scheme. For example, if, as Florida argues, the statute previously precluded interstate trust companies without limitation, the repealer provision of § 712, which terminates on October 31, 1981 the moratorium on out-of-state trust company subsidiary acquisitions by bank holding companies, is nonsensical.

C. Section 712 does not apply at all to investment advisory subsidiaries of bank holding companies. Thus, the law is unchanged as to that aspect of the case. Section 712 is again relevant, however, as a manifestation of Congress' understanding that bank holding companies are permitted to operate interstate businesses except to the extent expressly precluded by the Bank Holding Company Act of 1956. The addition by § 712 of a specific preclusion of interstate trust company acquisitions for a limited period, and the absence from the Act of such a specific preclusion with respect to investment advisory subsidiaries, reinforce the conclusion that bank holding companies are not pro-

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(footnote continued from preceding page)

> "[U]nder no circumstances would any institution that has filed an application to establish a trust department in a state other than where it has its primary operation . . . have to file a new application during the period of the moratorium. In other words, a pending application remains pending throughout the period of the moratorium, and the moratorium only prohibits the approving of an application during the period of the moratorium." 126 CONG. REC. H2384 (daily ed. March 31, 1980) (remarks of Rep. St. Germain).

hibited by the Act from conducting an interstate investment advisory business through locally incorporated subsidiaries. Application of the doctrine of *expressio unius est exclusio alterius* permits no other conclusion. *See National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974); *Walla Walla* v. *Walla Walla Water Co.,* 172 U.S. 1, 22 (1898).

D. Section 712 does not extend the prohibitions of § 3(d) to the carrying-on of trust activities in Florida by out-of-state corporate fiduciaries. Thus, Congress has not consented, even temporarily, to the discrimination against out-of-state firms embodied in Florida Statutes § 660.10.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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